93-579

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

KENNETH HEMMERLE AND
SUN-ISLAND REALTY, INC.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE
INSURANCE CORPORATION, as
Receiver for SUNRISE SAVINGS AND LOAN ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

KENNETH V. HEMMERLE
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Fort Lauderdale, FL 33304
(305) 467-6801

QUESTIONS PRESENTED

(1) Whether Petitioner was effectively denied due process of law as enumerated in the first eight amendments of the Federal Constitution (afforded by the Fourteenth Amendment to the United States Constitution) when:

(a) The Florida Courts denied due course of law for injury done in person and property, and thus, violated the State and Federal Constitutions;

(b) The District Court of Appeal, Fourth District of Florida exceeded its inherent power when it declare invalid Chapters 713 and 83 of the Florida Statutes, and, as such, interfered with eh legislative prerogative preventing Petitioner Due Process;

(c) The State Courts denied Due Process by denying Petitioner the right to be heard and adjudicate his claims regarding genuine issues of material fact, and, as such, was a denial of access to the courts.

(2) Whether Petitioner was denied equal protection of the laws in violation of the Fourteenth Amendment to the

Federal Constitution which provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof, that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person with its jurisdiction the equal protection of the law, or no arbitrary spoilation of property, and that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; and that all persons should be equally entitled to pursue their happiness and acquire and enjoy is property, when:

(a) Petitioner was denied the Declaration of Rights as to the enunciation of §§ 2, 9, 10 and 21 of the Constitution of the State of Florida;

(b) The decision of the District Court of Appeal, Fourth District of Florida was in direct conflict with decisions of other District Court of Appeal, and the Supreme Court of Florida on the same question of law;

(c) Petitioner was denied the right of foreclosure on the basis of res judicata or estoppel by judgment when

there was never a day in court regarding such lien foreclosure; and

(d) The Court applied res judicata and estoppel by judgement existed as to any prior litigation.

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JURISDICTION

The United States Supreme Court has jurisdiction to review this case by Writ of Certiorari pursuant to Title 28 U.S.C. § 1257(3).

On May 6, 1993, the Florida Supreme Court determined that it should decline to accept jurisdiction, and therefore, it dismissed the appeal and denied the petition for review.

REFERENCE TO STATE COURT OPINIONS

On November 14, 1991, the Trial Court, of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, Case No.: CL-10252 (AN), entered Summary Final Judgment.

After denial of Plaintiff's Motion for Rehearing and/or Reconsideration, an Appeal was taken to the District Court of Appeal, Fourth District of Florida Case No.: 92-0063.

After full briefing by the parties, the Appellate Court, by Opinion filed September 30, 1992, Appellants each files their own version of a Motion for Rehearing, and on

November 18, 1992, the Appellate Court denied both motions.

On December 9, 1992, Appellants' filed a Notice of Appeal and Notice to invoke discretionary jurisdiction in the Florida Supreme Court.

On May 6, 1993, the Supreme Court of Florida determined that it should decline to accept jurisdiction, and ordered that the appeal be dismissed and the petition for review denied.

CONSTITUTIONAL PROVISIONS

SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall otherwise be re-examined in any Court of the United States, other than according to the rules of common law.

NINTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA:

Article I, Section 2, Basic rights. -- All natural persons are equal before the law and have inalienable right, which are the right to enjoy and defend life and liberty, to pursue happiness, to be regarded for industry, and to acquire, possess and protect property; except that the

ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Article 1, Section 9, Due process. -- No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

Article 1, Section 21, Access to courts. -- The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article 1, Section 22, Trial by jury. -- The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

SECTION 713.30, FLORIDA STATUTES:

Other actions not barred. -- This part I shall be cumulative to other existing remedies and nothing contained

in part I of this chapter shall be construed to prevent any lienor or assignee under any contract from maintaining an action thereon at law in like manner as if he had no lien for the security of his debt, and the bringing of such action shall not prejudice his rights under part I of this chapter, except as herein otherwise expressly provided.

SECTION 85.011, FLORIDA STATUTES:

Enforcement by persons in privity with the owner. - - All liens on real or personal property for by part I or part II of chapter 713 are enforceable by persons in privity with the owners.

STATEMENT OF THE CASE

Following the takeover of **SUNRISE SAVINGS & LOAN ASSOCIATION (SUNRISE),** by the **Federal Savings and Loan Insurance Corporation (FSLIC),** there existed a construction loan agreement between **SUNRISE** and **Acquisition Corp. of America (ACA).** On September 1, 1987, as part of a settlement agreement between the parties,

the **FSLIC,** by written stipulation, entered into an agreement with **ACA,** it was agreed between the parties that ACA would improve the real estate during a 120 day period required for refinancing of the subject property, and that said improvements on the real property would be in an amount of $2,000,000.00.

ACA contracted with **KENNETH V. HEMMERLE,** d/b/a **HEMMERLE CONSTRUCTION COMPANY ("HCC")** for such improvements. **HCC** made improvements on the property in an amount exceeding $1,886,000.00, which the **FSLIC** refused or was unable to fund. The **FSLIC** refused to honor the draw request notwithstanding that it was included in the first modification of the construction loan which was authored by the **FSLIC.** There was never a dispute as to whether or not **HEMMERLE** performed the improvements which gave rise to the filing of the Mechanic Lien. It was the **FSLIC's** contention that they were not responsible for the indebtedness created by **ACA** for the improvements made on the subject property, notwithstanding that the improvements

were made pursuant to the orders of the **FSLIC,** and were embodies in the unilateral agreement drafted by the **FSLIC** through their agents, the **Federal Assets Disposition Association (FADA).**

Following the refusal to honor or pay the draw request made by **HCC,** on December 30, 1987, **HCC** filed a Mechanic's Lien on the subject property (App. 1). On November 2, 1988, **HCC** filed a Complaint (App. 2-14) to foreclose his Mechanic Lien together with a Lis pendens on the subject property, and was joined in this lawsuit by **SUN-ISLAND REALTY, INC (SIR),** resulting from an assignment of certain rights of this lien and a part of the proceeds, in order to make **SIR** whole for the hard construction of the improvements, and in order to comply with the agreement between **ACA** and the **FSLIC.**

On December 19, 1988, the **FSLIC** filed a Motion to Dismiss the Complaint and Discharge the Mechanic Lien (App. 15-18), and on January 13, 1989, the Trial Court denied the **FSLIC's** Motion to Dismiss and Discharge Lien. Following

the Court's Order denying said motion, the FSLIC filed its Answer and Affirmative Defenses.

On February 23, 1989, the **FSLIC** filed a Motion for Summary Judgment. On April 4, 1989, **HCC** and **SIR** filed a verified Motion to Strike the **FSLIC's** Motion for Summary Judgment as being wholly sham (App. 19-31). The **FSLIC's** Motion for Summary Judgment was denied. On June 30, 1989, the **FSLIC** filed an Amended Motion for Summary Judgment, and on July 21, 1989, the Plaintiffs filed a response to the amended motion for Summary Judgment. Following an Order setting special hearing on the **FSLIC's** Amended Motion for Summary Judgment, to be heard on November 8, 1989, and following the hearing on said motion, the Trial Court ordered Memorandum of Law as to Count I of Plaintiffs' Complaint, which was filed on November 17, 1989,

On January 4, 1991, the Court entered its Order setting Jury Trial on the Calendar beginning July 1, 1991, and directing pretrial and mediation procedure.

On February 5, 1991, the **FSLIC** filed a renewed

Motion for Summary Judgment, together with a Memorandum in support thereof. And on February 7, 1991, the **FSLIC** filed a Motion to Strike the case from jury docket.

On September 11, 1991, **HEMMERLE** filed an Affidavit in Opposition to the **FSLIC's** Renewed Motion for Summary Judgment. And on the 19th of September, 1991, the Court ordered Memoranda from the **FSLIC.** On October 7, 1991, the 1991, the **FSLIC** filed a Supplemental Memorandum in support of its Renewed Motion for Summary Judgment with certain exhibits attached thereto. On October 8, 1991, the Plaintiffs filed a Reply to the **FSLIC's** Supplemental Memorandum.

The **FSLIC's** conclusion in its Renewed Motion for Summary Judgment, was that the Claim of Lien was subordinate to the **FSLIC's** interest in the property, and was extinguished by the foreclosure sale and subsequent to the issuance of the certificate of Title to the **FSLIC,** and, as such, was meritless in that it, had been determined by the **FSLIC's** initial Amended Motion for Summary Judgment. It was made

clear that, pursuant to the **FSLIC's** request and demand by its unilateral contract, the borrower (ACA), by virtue of that request and demand, contracted with **HEMMERLE** for the improvements demanded by the **FSLIC.**

By the **FSLIC's** Renewed Motion for Summary Judgment, it was argued that new proofs were submitted at hearing on said motion, notwithstanding that no such proofs can be supported by the record. The basis of the **FSLIC's** argument of new proofs, was the doctrine of res judicata and/or estoppel by judgment, and that such reasoning was that the judgment entered against the **FSLIC,** was for the same imprcvements that gave rise to the Claim of Lien. the record revealed that even if the argument of res judicata and/or estoppel by judgment stemming from Case No. 88-818, were for the same improvements, which Plaintiffs' strongly denied, the amended motion for summary judgment that was heard and denied on November 9, 1989, was some 55 days after the jury entered its verdict in Case No. 88-818. The **FSLIC** at any time from the jury verdict to the date of

hearing on its amended motion, could have included the argument of res judicata and/or estoppel by judgment. Furthermore, the **FSLIC's** argument regarding the judgment in Case No. 88-818, which was in favor of the appellants, which amounted to 26.0 million dollars, was reversed with directions for the Trial Court to enter a Directed Verdict in favor of the **FSLIC.** This reversal should have defeated the argument of payment pursuant to that judgment.

On November 14, 1991, the Court granted the **FSLIC's** Renewed Motion for Summary Judgment. The Summary Final Judgment, the findings of fact, and the Court's Conclusions of Law, as drafted and submitted by the **FDIC** (as substituted for the **FSLIC**) is, on its face, contrary to the general principals that support a motion for summary judgment. There was no evidence in the record which would establish the findings of fact included in the Summary Final Judgment (App. 32-36).

On November 21, 1991, the Plaintiffs filed a Motion for Rehearing and/or Reconsideration (App. 37-45), setting forth

facts that Summary Judgment, once denied, cannot subsequently be granted without new proofs. On December 17, 1991, the Trial Court denied Plaintiffs's Motion for Rehearing and/or Reconsideration.

In january, 1991, Plaintiffs' filed their Notice of Appeal to the District Court of Appeal, Fourth District of Florida (App. 46).

After full briefing (App. 47-100), on September 30, 1992, the District Court of Appeal, entered its opinion of affirmance of judgment entered by the Trial Court (App. 101-104).

On October 8, 1992, Plaintiffs/Appellants each filed their own version of a Motion for Rehearing (App. 104-120). And on November 18, 1992, the District Court of Appeal denied Appellants's Motion for Rehearing (App. 121).

On December 7, 1992, Appellants filed a Notice of Appeal and a Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court (App. 122-123). On the 16th of january, 1993, Petitioners filed their Jurisdictional Statement

which exceeded the maximum pages permitted by the Florida Supreme Court Rules, and subsequently field an Amended Jurisdictional Statement (App. 124-139).

On May 6, 1993, the Supreme Court of Florida, determined that: Is should decline to accept jurisdiction; ordered that the appeal be dismissed; and, the petition for review be denied (App. 140).

REASON FOR GRANTING WRIT OF CERTIORARI

ARGUMENT

The United States Supreme Court has jurisdiction to review a case from a state court in which to either: (1) the validity of a state statute is drawn into question on the ground of it being repugnant to the United States Constitution; or, (2) a right, privilege, or immunity is specifically set up or claimed under the United States Constitution. 28 U.S.C. § 1257(3).

Petitioner maintains that, he was denied his constitutional right to trail by jury (afforded by the Seventh Amendment to the United States Constitution; his due process rights; and, equal protection rights (afforded by the

Fourteenth Amendment to the United States Constitution) when: (1) a Florida Circuit Court denied a motion for Summary Judgment against Petitioner on two separate occasions, before two different judges, and then, after the third judge was appointed to try the case, he entered summary judgment where no new proof was submitted, and where there existed genuine issues of material fact as affirmed but he two prior judges, thus, denying access to the court, and denying due process (App. 32-36); (2) the Florida Fourth District Court of Appeal affirmed the entry of Summary Final Judgment per curiam with opinion (App. 101-104); (3) the Florida Supreme Court Determined that it should decline to accept jurisdiction and dismissed the appeal, and denied the petition for review (App. 140).

PETITIONER RAISED A FEDERAL QUESTION IN THE STATE COURT

I. Petitioner sufficiently raised a federal question in the state court when, in the Motions for Rehearing (App. 105-120) by denying equal protection regarding the mandate of §

713.30 Florida Statutes; by failing to apply case law on an equal basis as to its own decisions, as well as decisions of other District Courts, and decisions of the Florida Supreme court, Petitioner sufficiently raised a federal question by stating that he was denied his right to trial by jury, his due process right, and his equal protection right.

> The Constitution of the United States declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Moreover, the due process clause of the United States Constitution has been held to embrace equal protection of the laws... The state and Federal Constitutions accord all persons equal rights before the law... [Petitioners'] claims... The [Petitioner] contends that where a party has submitted himself to the jurisdiction of the courts concerning the determination of his legal rights, he is guaranteed the privilege of having the merits of his cause adjudicated by the proper judicial tribunal, and where a jury trial is to be had, before an impartial jury... As such, equal protection forbids unjust discrimination. Although the law may be fair on its fact and impartial in appearance, if in its application and administration it unjustly and illegally discriminates between person in similar circumstances in a manner so as to effect their material rights, there is a denial of equal justice which is prohibited by the Federal Constitution. It is a denial of equal protection of the law to make the execution of

> discretion dependent on the unbridled decision of the Trial Court to deny a jury verdict... When the Trial Court removed this right from the province of the jury, it denied [Petitioners'] fundamental right. The concept *"liberty"* in the due process clause of the Fourteenth Amendment to the Federal Constitution embraces all the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. [quoting the Fourteenth Amendment]

II. A Federal question was raised in the District court of Appeal, when it was argued that "Appellants" were denied access to the court pursuant to the Florida Constitution, Article 1, Section 21; was denied equal protection of the laws in that the affirmance of the Summary Final Judgment was contrary to Florida Case Law established in all of the District Courts of Florida as well as the Florida Supreme Court. Equal protection forbids unjust discrimination. If the Affirmance by the State Appellate Court unjustly and illegally discriminates between person in similar circumstances in a manner so as

to effect their material rights, this is a denial of equal justice which is prohibited by the Federal Constitution. When the Appellate Court affirmed the Summary Final Judgment, contrary to all existing state law, not only did it deny equal protection, but, also, denied Appellants their fundamental right to a jury trial.

III. Sufficient federal questions were raised when the state court proceeding actually passed or decided upon a federal question; the record shows that the Florida District Court expressly and impliedly (1) ruled on the federal question adversely to the Appellants, and (2) that such ruling was contrary to the clear mandate of the Federal constitution for the determination of the case. **First Nat'l. Bank v Estherville,** 215 U.S. 341, 30 S. Ct. 152, 54 L. Ed 223 (1910); **Kansas Endowment Association v. Kansas,** 120 U.S. 103, 7 S. Ct. 499, 30 L. Ed. 593 (1887); **Sayward v. Denny,** 158 U.S. 180 S. Ct. 777, L. Ed. 941 (1895).

IV. Where **HEMMERLE** and **SIR** sought an appeal and Discretionary Review in the Florida Supreme Court from

the decision of the Fourth District Court of Appeal, and the Supreme Court of Florida having determined that it should decline to accept jurisdiction, dismissed the appeal, and denied the petition for review that rests solely on federal grounds, the United States Supreme court may take jurisdiction. **Durley v. Myo,** 351 U.S. 277, 76 S. Ct. 806, 100 L. Ed. 1178 (1956). The United States Supreme Court has jurisdiction to review this case because the Supreme court of Florida impliedly decided upon a federal question when it merely dismissed the appeal and declined to accept jurisdiction on the petition for review (App. 140). There were no adequate, non-federal grounds on which the Florida Supreme Court could have decided the case. Nothing in the record suggests that the Florida Supreme Court decided or passed upon a non-federal question. The record suggest that the Florida Supreme Court did decide solely upon a federal question. **Minnesota v. National Tea Company,** 309 U.S. 551, 60 S. Ct. 676, 84 L. Ed. 920 (1940) (where there is uncertainty as to state court's decision, the Supreme court

may vacate and remand case for clarification by state court).

V. It is clear that the Constitutional right to a jury trial, where and insofar as it exists, cannot be made a nullity, destroyed, annulled, obstructed, impaired, or restricted by legislative or judicial action. **Ex Parte Paterson,** 253 U.S. 300, 64 L. Ed. 919, 40 S. Ct. 543; **Slocum v. New York L. Inc. Co.** Where the right to a jury trial has been given, if it is a substantial one, it should be vigorously enforced. **Miami Copper Co. v. State,** 17 Ariz. 179, 149 P. 758.

VI. Equal protection of the law is something more than an abstract right; it is a command which the states must respect, the benefits of which every person may demand. Similarly, the laws to which the Fourteenth Amendment's guaranty of equal protection have reference, do not relate to abstract units but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The District Court of Appeal, Fourth District of Florida, cannot justify failure to comply with the constitutional mandate requiring equal

protection of the law. The Federal Constitution forbids sophisticated as well as simple-minded modes of discrimination.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

KENNETH V. HEMMERLE, SR.
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

APPENDIX A

December 31, 1987 87-377966

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CLAIM OF LIEN

State of Florida
County of Broward

Before me, the undersigned Notary, personally appeared KENNETH V. HEMMERLE, SR. who was duly sworn and says that he is the holder of the lienor herein

KENNETH VE. HEMMERLE, SR., D/B/A HEMMERLE CONSTRUCTION CO.

whose address is 808 N.E. Third Avenue, Fort Lauderdale, FL 33304 and that in accordance with a contract with THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, as receiver for Sunrise Savings and Loan Association, and ACQUISITION CORP. OF AMERICA lienor furnished labor, services or materials consisting of:

Labor and Materials for the construction of Building One (1) of COSTA DEL SOL, a condominium, 7000 Southwest 18th Street, Boca Pointe, Palm Beach County, Florida

of a total value of One Million Eight Hundred Eighty-Six Thousand Five Hundred Sixty dollars $1,886,560.00 of which there remains unpaid $1,885,560.00 for which amount he claims a lien on the following described real property in Palm Beach County Florida

Tract F-1 of the Plat of Boca Pointe No. 4 as recorded in Plat book 43, pages 194-196 of the Public Records of Palm Beach County, Florida, the South boundary line of said Tract F-1 being shown as "proposed North right of way line" on said Plat of Boca Pointe No. 4 a/k/a 7000 S.W. 18th Street, Boca Raton, Palm Beach County, Florida

Owned by ACQUISITION CORP OR AMERICA

and further says that lienor furnished the part of said labor, services or materials on January 5, 1987 and the last of the items on December 30, 1987, and if the lien is claimed by one not in privy with the owner that the lienor served his notice to the owner on _____, 19.

Kenneth V. Hemmerle, Sr.

Sworn and subscribed before me on the 30th day of

December 1987.

Nancy G. Felcer

Notary Public

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

SUN-ISLAND REALTY, INC., a Florida corporation, C/S/A, KENNETH HEMMERLE, D/B/A HEMMERLE CONSTRUCTION CO.,

Plaintiffs,

-VS-

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a United States corporation,

Defendant,

_____/

COMPLAINT

Plaintiff, SUN-ISLAND REALTY, INC, as a principle of Contribution, Subrogation and Assignment, (hereinafter SUN-ISLAND), sue THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION (hereinafter FSLIC), and alleges:

1. Plaintiff is a Florida corporation, having its principal place of business in Broward County, Florida.

2. Defendant, FSLIC is an instrumentality of the United States and has the power to sue and be sued, complain and

defend, in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico, pursuant to U. S. C. Title 12 §1725 and as such is sui juris.

FACTUAL INTRODUCTORY ALLEGATIONS

3. In December, 1983, KENNETH V. HEMMERLE and one RON MORRIS purchased each 50% of the shares of stock in ACQUISITION CORP. OF AMERICA, (hereinafter ACQUISITION), for the purpose of acquiring a certain parcel of real estate in the Boca Pointe PUD, located in Palm Beach County, Florida.

4. The property was purchased for the sole purpose of erecting thereon a certain real estate development, a condominium known as COSTA DEL SOL OF BOCA POINTE, (hereinafter the Project).

5. In December, 1983, SUNRISE SAVINGS AND LOAN ASSOCIATION (hereinafter SUNRISE), entered into a Note, Mortgage and Loan agreement with ACQUISITION to fund the purchase of the land. (acquisitions), and to construct phase

one of the project, consisting of 179 units of the total 358 units.

6. ACQUISITION entered into a contract with HEMMERLE to build the construction project including the site development, and entered into a contract with SUN-ISLAND for the marketing and sales of the project.

7. In 1984, ACQUISITION, through HEMMERLE CONSTRUCTION CO., (hereinafter HEMMERLE), began construction improvements. In 1985, SUNRISE began shorting ACQUISITION'S draw requests and in some instances did not fund at all which interrupted the progress of construction.

8. Shortages of draws were due to the financial problems of SUNRISE, and following these problems, on July 18, 1985, the FSLIC was duly appointed by the Federal Home Loan Bank Board as sole receiver for SUNRISE, and on that same day FSLIC took possession and succeeded to all rights and obligations of SUNRISE.

9. On July 18, 1985, the FSLIC transferred all of the

assets and liabilities of SUNRISE including all claims, as well as the Note and Mortgage, and Loan Agreement between SUNRISE and ACQUISITION, to SUNRISE SAVINGS AND LOAN ASSOCIATION, a Federal Savings and Loan Association, (hereinafter NEW SUNRISE), which was a newly chartered federal mutual savings and loan association.

10. Following the formation of the NEW SUNRISE, FSLIC was a controlling factor in the functions of the NEW SUNRISE, and sometime between December, 1985 and March 26, 1986, ACQUISITION and the NEW SUNRISE through the appointed counsel of the FSLIC agreed to an amendment to the loan agreement. On February 25, 1986, drafts of the closing documentation for the modification and amendment of the loan agreement were reviewed by the parties. Following changes on March 26, 1986 at the offices of Blackwell, Walker, Fascell & Hoehl, 2400 Amerifirst Building, One Southeast Third Avenue, Miami, Florida, closing on the modification and amendment took place.

11. Although the FSLIC through their agent Mr. David

Hoyt, and by the terms of paragraph 2 (B) of the Amendment to the Loan Agreement, which states that Lender will finance the construction of the improvements with respect to Building Number 1, Phase 1, as defined in Exhibit "C" to the Declaration of Condominium of the project, in an amount not to exceed Two Million Tow Hundred Fourteen Thousand Five Hundred Sixty Dollars ($2,214,560.00), and that funding shall be in accordance, setting forth the revised line item adjustments as approved by the Lender, SUNRISE failed and refused to fund pursuant to the Amendment to the Loan Agreement.

12. By the terms of the Amendment to the Loan Agreement, two additional conditions were made by the FSLIC through their agent Mr. David Hoyt, and the conditions were that first, it would be necessary for one of the parties representing ACQUISITION to purchase the shares of stock owned by RON MORRIS, and second, that SUN-ISLAND REALTY would become a guarantor to the Note and Mortgage as modified.

13. The parties representing ACQUISITION fully performed all of the conditions by them to be performed, but the FSLIC, SUNRISE and their agent failed and refused to fund the project as agreed by the terms of the Amended Loan Agreement.

14. Following the breach of the FSLIC and NEW SUNRISE, ACQUISITION and SUN-ISLAND filed suit in the Circuit Court for the Eleventh Circuit of Dade County, Florida. This action was subsequently transferred to Federal District Court and dismissed, such dismissal is now under appeal to the United States Court of Appeal for the Eleventh Circuit.

15. On December 18, 1986, the FSLIC filed suite against ACQUISITION, SUN-ISLAND and HEMMERLE in the Circuit Court of the Fifteenth Judicial Circuit, Case No. 86-11741 (CL) E. This action was filed t foreclose the original mortgage as modified by the amended loan agreement.

16. On September 1, 1987, the FSLIC through their agent FADA, entered into a settlement agreement with ACQUISITION, SUN-ISLAND and HEMMERLE. The purpose

of this agreement was to settle all disputes between the parties. As part of this agreement, the FSLIC had made certain claims of which ACQUISITION, SUN-ISLAND and HEMMERLE strongly denied, however, ACQUISITION, SUN-ISLAND and HEMMERLE agreed not to contest such claims as part of the settlement agreement provided that all conditions were met pursuant to the agreement. As part of the agreement, the FSLIC agreed that due t the fact that SUNRISE had failed to fund as agreed by the amendment and modification, there was a failure of consideration for the guarantee of SUN-ISLAND and as such, the guaranty of SUN-ISLAND was not enforceable.

17. As part of the agreement, ACQUISITION agreed to continue construction of the improvements on the project through HEMMERLE CONSTRUCTION CO., and to continue construction in accordance with the plans and specifications of the improvements. It was further agreed that the ongoing improvements pursuant to the settlement agreement would amount to $2,000,000.00. Certain conditions were agreed

upon orally for the funding of the $2,000,000.00 in improvements, one of which was that the balance of utility improvements would be completed. As a part of said utility improvements, ACQUISITION agreed to complete the main entrance road which would complete all of the utility improvements and would further release the completion letter of credit originally supplied by OLD SUNRISE for the benefit of ACQUISITION. Although the FSLIC agreed to assist HEMMERLE in obtaining permission from the County for the completion of the aforesaid road, FSLIC failed in that assistance which was necessary in that FSLIC was in possession of the OLD SUNRISE'S obligation by virtue of the letter of credit.

18. Another condition to the settlement was that ACQUISITION would satisfy an agreed debt in the amount of $8,275,000.00 within 120 days of the execution of the agreement. At the time of execution of this settlement agreement, HEMMERLE requested additional time if necessary for the refinance of the $8,275,000.00. The FSLIC

through their agent, FADA, agreed t a short extension if need be for the funding of the $8,275,000.00. FADA informed the parties at the closing of the settlement agreement that tins additional time could not be put in contract form due to the constraints of the FSLIC and a modification at this time would be far too time consuming. The FSLIC noted that the ongoing construction would prevent reservation buyers from canceling.

19. Notwithstanding, FSLIC'S agreement to give ACQUISITION additional time for the funding of the $8,275,000.00, the FSLIC on request from ACQUISITION for additional time in which to close a new loan, said time being February 15, 1988, the FSLIC failed and refused to grant any additional time exceeding the 120 days, and that payoff in cash would be necessary on or before the 31st of December, 1987.

20. Although the FSLIC foreclosure action had been pending since December 1986, no action had taken place following the Settlement Agreement. At the time of the

settlement agreement ACQUISITION through SUN-ISLAND paid over to the FSLIC, as partial payment, $82,750.00, leaving a balance of $8,192,250.00.

21. Between April, 1987 and December, 1987, SUN-ISLAND advanced to HEMMERLE CONSTRUCTION CO., an amount exceeding $1,886,560.00 for the improvements on the project. The advancement of these funds for the improvements were so advanced by virtue of the stipulation and settlement agreement entered into on September 1, 1987 by and between the FSLIC and ACQUISITION, SUN-ISLAND and HEMMERLE.

22. Due to the FSLIC'S failure to grant additional time in which to refinance the agreed debt, on December 30, 1987, ACQUISITION made a decision for file a Chapter 11 Bankruptcy Petition. The Petition was filed on December 30, 1987. The FSLIC filed a Motion to Dismiss the Bankruptcy on January 13, 1988. ACQUISITION filed its statement of all liabilities on January 29, 1988. ACQUISITION responded to the FSLIC'S Motion to Dismiss on January 28, 1988. The

Bankruptcy Court dismissed ACQUISITION'S bankruptcy proceeding for failure to file schedules. On February 2, 1988, ACQUISITION moved for rehearing of the order dismissing bankruptcy. On March 3, 1988, the Bankruptcy Court granted ACQUISITION'S motion for rehearing and reinstated the Chapter 11 proceeding. The Bankruptcy Court also required ACQUISITION to pay $5,000.00 to the Clerk of the Court because of its untimely filing of schedules. The Bankruptcy Court granted partial stay relief to the FSLIC in which to proceed with the foreclosure in the state court, but, further ordered that no sale of the property could take place until further order of the court. The Bankruptcy Court also required ACQUISITION to file a plan of reorganization within 30 days of February 29, 1988. On March 30, 1988, ACQUISITION filed its plan of reorganization essentially provided that the FSLIC and all other creditors would be fully paid out of a new construction loan on the partially improved 358 unit condominium project. The land and improvements has a current market value of $25,870,000.00 pursuant to

ACQUISITION'S M. A. I Appraisal dated September 14, 1987. The amount of FSLIC'S claim pursuant to the September, 1987 Settlement Agreement as modified is $8,192,250.00.

23. On April 5, 1988, the Bankruptcy Court entered an order setting hearing to consider approval of disclosure statement, setting last day to file application for compensation, setting hearing on confirmation and setting last day to accept or reject plan. On May 5, 1988, ACQUISITION filed a revised plan of reorganization and an amended disclosure statement. On May 5, 1988, the FSLIC filed its objections to the disclosure statement. On May 9, 1988, a hearing was held before the Bankruptcy Court to consider approval of ACQUISITION'S disclosure statement. At the May 9, 1988 hearing, ACQUISITION advised the Bankruptcy Court that a commitment for a 24 million dollar construction loan had been issued which would be funded within 60 days. ACQUISITION further advised the Bankruptcy Court that no creditors were at risk under ACQUISITION'S plan. The FSLIC stated at the hearing that they filed a proof

of claim on April 29, 1988 in the amount of $14,198,141.76 which had not been objected to. ACQUISITION advised the Court that the true claim of the FSLIC was $8,192,250.00 pursuant to the settlement agreement. ACQUISITION reminded the Court that it had previously ruled that a sale of ACQUISITION'S property would not be allowed if ACQUISITION obtained a commitment.

24. After the May 9, 1988 hearing, ACQUISITION filed its objections to the proof of claim filed by the FSLIC. ACQUISITION also field an adversary proceeding against the FSLIC in the Bankruptcy Court challenging the amount and validity of the claim of the FSLIC.

25. On May 12, 1988, the Bankruptcy Court entered its written order on disclosure statement based upon the May 9, 1988 hearing. The order required that ACQUISITION deposit $15,000,000.00 in a bank located in the Southern District of Florida which account was to be clearly identified as being held for the benefit of the FSLIC, otherwise, the sale of the project would take place at 11:00 A.M. on Monday,

May 16, 1988. On May 11, 1988, ACQUISITION moved the Bankruptcy Court to deny any relief from the automatic stay of the foreclosure sale and rehearing and reconsideration of its order on disclosure statement announced in open court on Monday, May 9, 1988.

26. On December 30, 1987, HEMMERLE filed his claim of Lien based upon the labor and material in place pursuant to the settlement agreement between the FSLIC and ACQUISITION. By virtue of the settlement agreement, HEMMERLE is in privity with the FSLIC. On December 31, 1987, HEMMERLE assigned all f his right title and interest in and to the claim of lien to SUN-ISLAND, as SUN-ISLAND had advanced all funds for the improvements and interest in the claim on the property.

COUNT I
MECHANIC LIEN FORECLOSURE

27. This is an action to enforce a mechanic's lien on real property in Palm Beach County, Florida.

28. Paragraphs 3 through 26 are realleged.

29. On September 1, 1987, the FSLIC through the

Federal Asset Disposition Association, (hereinafter FADA) entered into a contract with SUN-ISLAND, HEMMERLE and others which provided in pertinent part that within 120 days following the execution of the contract, improvements totaling $2,000,000.00 would be made on the property which is now owned by the FSLIC. (Copy attached as Plaintiff's Exhibit "A").

30. Pursuant to the contract aforementioned Plaintiff furnished the first of its work on or about September 2, 1987, the work, having a total value of $1,886,560.00 of which there remains unpaid $1,886,560.00, although Plaintiff has made demand upon the previous owner, ACQUISITION CORP. OF AMERICA, (hereinafter ACQUISITION), and FSLIC having full knowledge of the aforesaid improvements fails and refuses to pay this amount.

31. On December 30, 1987, HEMMERLE filed a Claim of Lien at the office of the Clerk of the Circuit Court of Palm Beach County, Florida, for the sum of $1,886,560.00, a copy of which is attached as Plaintiff's Exhibit "B". Plaintiff has

caused a copy of the Claim of Lien to be delivered to ACQUISITION and ACQUISITION has received a copy of said lien.

32. On May 16, 1988, the FSLIC became owners of the subject property by virtue of a Certificate of Sale, and as such is obligated for any and all liens attached to the property not foreclosed by the foreclosure action.

33. On December 30, 1987, HEMMERLE assigned his interest in the Claim to SUN-ISLAND in that SUN-ISLAND became subrogated thereto of such assignment attached hereto and made a part hereof as Plaintiff's Exhibit "C".

34. SUN-ISLAND has been required to retain the services of the undersigned attorney and has promised to pay a reasonable attorney's fee and cost for the presentation of this action; and the FSLIC is liable therefore in accordance with applicable Florida law.

WHEREFORE, Plaintiff, SUN-ISLAND prays that this Honorable Court will:

a) Enter its Final Judgment adjudicating that the

Plaintiff has a lien against the above described property in the amount of $1,886,560.00, plus pre-judgement interest costs and reasonable attorney's fee, and;

b) That in default of payment of the amount to the Plaintiff, that the above described property be sold at judicial sale in accordance with law, and;

c) Should a deficiency occur after application of the proceeds of the sale, the Plaintiff, SUN-ISLAND, be granted a deficiency decree against the FSLIC as owners, and;

d) Grant such other and further relief as the Court deems just and proper.

COUNT II
BREACH OF CONTRACT

36. SUN-ISLAND realleges paragraphs 3 through 26 and alleges further.

37. On or about March 26, 1986, ACQUISITION and the FSLIC executed an amended loan agreement in which the FSLIC agreed to have the NEW SUNRISE fund the construction loan as amended for Phase (1) one of the COSTA DEL SOL project. This amended loan agreement was

executed by the parties with the full knowledge that HEMMERLE CONSTRUCTION CO. was the General Contractor.

38. Notwithstanding the FSLIC'S agreement to fund the amended loan agreement through the NEW SUNRISE, upon request from HEMMERLE CONSTRUCTION CO., the FSLIC through the NEW SUNRISE failed and refused to fund said request as requested although the labor and materials on which the request was made was completed as requested.

39. On September 1, 1987, ACQUISITION, SUN-ISLAND and HEMMERLE entered into a Settlement Agreement (Exhibit "A") with the FSLIC, whereby FSLIC requested that part of the settlement agreement was that an additional $2,000,000.00 in construction be completed within the 120 days following the execution. At the time of the execution of the settlement agreement, the FSLIC well knew that HEMMERLE CONSTRUCTION CO. was the General Contractor for the construction of phase one of the COSTA

DEL SOL project, and in fact, expected HEMMERLE CONSTRUCTION CO. to make the $2,000,000.00 in improvements on the subject property.

40. The FSLIC through their agent FADA, at the time of the execution of the settlement agreement, agreed that an extension of the 120 days would be granted, if needed to refinance the construction loan and to satisfy the agreed debt between the FSLIC and ACQUISITION.

41. The FSLIC failed and refused to permit ACQUISITION the additional time needed to refinance the construction loan and satisfy the agreed debt, with the knowledge that $1,886,560.00 in improvements had been made on the project, and at the time of execution they received $82,750.00 as consideration for the execution of the settlement agreement.

42. The FSLIC had breached the settlement agreement, and consequently breached the construction contract in which to make funds available for the payment of the improvements.

43. The FSLIC owes SUN-ISLAND $1,886,560.00 for work performed subsequent to the settlement agreement, although demand has been made upon the FSLIC by virtue of the Claim of Lien, the FSLIC has failed and refused to pay same to SUN-ISLAND.

44. SUN-ISLAND has performed all conditions required to be performed by it, or the conditions are excused.

WHEREFORE, SUN-ISLAND prays this Court award damages in amount exceeding $1,886,560.00, pre-judgment interest, costs of this action, reasonable attorney fees and further request a trial by jury as to all issues so triable.

COUNT III
FRAUD IN THE INDUCEMENT

45. SUN-ISLAND realleges the statements of facts in paragraph 3 through 26 as its paragraph 45 and alleges further.

46. Defendant, the FSLIC, through their agent FADA, assured SUN-ISLAND that following the execution of the settlement agreement, setting forth the terms of satisfying the agreed debt, that if an extension was needed to refinance the

agreed debt, it would be granted for a short period of time.

47. The FSLIC, through their agent FADA further agreed that as an inducement to enter int the settlement agreement the project should improve in the amount of $2,000,000,00 on or before the expiration of the 120 day period and further stated that the aforesaid improvements would inure to the benefits of the FSLIC in the event of a breach by ACQUISITION.

48. In performing the aforesaid improvements, SUN-ISLAND relied upon the fact that if the FSLIC became owners of the subject property due to a breach by ACQUISITION, the FSLIC would then become responsible for payment of any improvements made on the subject property due to the insistence of the improvements.

49. At the time SUN-ISLAND and the FSLIC agreed upon the terms of the settlement agreement between the FSLIC and ACQUISITION on September 1, 1987, it was fully understood that any improvements made to the subject property during the 120 day period of construction and the

cost involved for such improvements would run with the subject property and be the responsibility of the owner of the property at the time the costs were satisfied.

50. The agreement for payment was made for the sole purpose of inducing HEMMERLE CONSTRUCTION CO. t make said improvements and for SUN-ISLAND to advance the funds necessary for said improvements, at the time of such inducement the FSLIC never intended t satisfy the debt incurred by the improvements, and as such created fraud in the inducement.

WHEREFORE, SUN-ISLAND prays that this Court enter judgment against the FSLIC in an amount exceeding $1,886,560.00, for damages suffered by SUN-ISLAND for the improvement created by Fraud in the Inducement, pre-judgment interest on such funds, and for such other and further relief as the Court deems right and proper. SUN-ISLAND demands trial by jury as to all issues so triable.

COUNT IV
ASSUMPSIT

51. SUN-ISLAND realleges the factual allegations

contained in paragraphs 3 through 26 are its paragraph 51 and alleges further.

52. The FSLIC is indebted to SUN-ISLAND in the sum of $1,886,560.00 for improvements made on the Costa Del Sol Project at the request of the FSLIC, the project more fully described as:

> Tract F-1 of the Plat of Boca Pointe No. 4, as recorded in Plat Book 43, pages 194-196 of the Public Records of Palm Beach County, Florida, the South boundary line of said Tract F-1 being shown as proposed North right-of-way line, on said Plat of Boca Pointe No. 4, a/k/a 6850 and 7000 S.W. 18th Street, Boca Pointe, Palm Beach County, Florida.

53. SUN-ISLAND paid, laid out, expended and advanced for the benefit of the FSLIC the sum of $1,886,560.00.

54. The FSLIC has not paid to SUN-ISLAND any part or portion of the sum herein alleged, and the whole thereof is now due and unpaid.

WHEREFORE, SUN-ISLAND prays this Court award actual damages in the amount of $1,886,560.00 resulting from the improvements paid by SUN-ISLAND for the benefit of the

FSLIC and for such and other relief as the Court deems right and proper. Plaintiff demands trial by jury as to all issues so triable.

COUNT V
QUANTUM MERUIT

55. SUN-ISLAND realleges the factual allegations contained in paragraphs 3 through 26 as its paragraph 55 and alleges further.

56. On September 1, 1987, the FSLIC requested by virtue of a Settlement Agreement (Exhibit "A") between the FSLIC and ACQUISITION CORP. OF AMERICA, that improvements be made to the Costa Del Sol project in the amount of $2,000,000.00.

57. SUN-ISLAND was a party to the Settlement Agreement, and as such advanced to HEMMERLE CONSTRUCTION CO. (Project's General Contractor), the sum of $1,886,560.00 for the improvements requested by the FSLIC and incorporated in the Settlement Agreement, (Exhibit "A").

58. The reasonable value of the work, labor, and

services performed, and the materials supplied for such work, labor and services is in excess of $2,000,000.00, of which an amount equal to an excess of $1,886,560.00 was advanced by SUN-ISLAND.

59. The FSLIC though requested, has not paid SUN-ISLAND said sum of money, or any part thereof, and refuses to do so.

60. The FSLIC has been unjustly enriched as a result of the improvements on the project by virtue of their ownership interest in the said Costa Del Sol project, and SUN-ISLAND has been damaged in the amount of $1,886,560.00 thereby.

WHEREBY, SUN-ISLAND prays judgment against the FSLIC for damages in excess of $1,886,560.00, for pre-judgment interest, from September 1, 1987 pursuant to the time advanced, costs of this action and for such and other relief as this Court deems just and equitable.

LEWIS A BERNS
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304

Telephone: (305) 467-6801
Fla. Bar No. 393509

APPENDIX C

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL88-10252 (AO)
SUN-ISLAND REALTY, INC., a Florida corporation, C/S/A, KENNETH HEMMERLE, D/B/A HEMMERLE CONSTRUCTION CO.,

Plaintiffs,

-VS-

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a United States corporation,

Defendant,

_____/

DEFENDANT'S MOTION TO DISMISS

COMPLAINT AND DISCHARGE LIEN

Defendant, the Federal Savings and Loan Insurance Corporation, as Receiver for Sunrise Savings and Loan Association ("FSLIC"), moves this Court for an order dismissing the complaint filed herein, and in support thereof states as follows:

1. On or about November 2, 1988, plaintiff commenced this action seeking to foreclose a mechanics lien

and for certain other relief, by filing said complaint; plaintiff has never served defendant.

2. Plaintiff seeks to foreclose upon a Claim of Lien filed by Kenneth Hemmerle d/b/a Hemmerle Construction Co in the sum of $1,886,560.00 which lien was recorded on December 31, 1987, against property then owned by Acquisition Corp. of America (the "Claim of Lien"). The Claim of Lien alleges that Kenneth Hemmerle, d/b/a Hemmerle Construction Co., pursuant to a contract with defendant FSLIC and Acquisition Corp. of America, furnished labor and materials for construction of a building at a condominium project located in Boca Raton known as Costa Del Sol (the "Property"). A copy of the Claim of lien is annexed hereto as Exhibit "A".

3. In addition to a course of action to foreclose the Claim of Lien, plaintiff's complaint asserts causes of action for Breach of Contract (Count II), Fraud in the Inducement (Count III), Assumpsit (Count IV) and Quantum Merit (Count V) all premised upon the alleged contract identified in the

Claim of Lien. Plaintiff Sun-Island Realty, Inc. brings this action based upon an assignment by Hemmerle of his rights, title and interest in the Claim of Lien to Sun-Island Realty, Inc.

4. Plaintiff's Claim of Lien was extinguished by the public sale of the Property held on May 16, 1988, as a result of a Partial Summary Judgment of Foreclosure dated March 17, 1988, in favor of FSLIC and against Acquisition Corp. of American in an action pending in this court entitled Federal Savings and Loan Insurance Corporation, as Receiver for Sunrise Savings and Loan Association v Acquisition Corp. of America, et al., Case No. 86-11741 (CL)E. This foreclosure action was filed on December 19, 1986, together with a Notice of Lis Pendens which was recorded in Official Records Book 5113 at Page 48. The Claim of Lien at issue herein, which was recorded on December 31, 1987 at Official Records Book 5531 at Page 609, was filed well after the foreclosure proceeding. Florida Statute §48.23(1)(b).

5. The issues raised in this litigation involving allegations of breach of a settlement agreement entered into

between the parties have been previously decided by the court in the aforestated foreclosure action. Therefore, plaintiff is precluded by re judicata or collateral estoppel from raising the same issues in its complaint in this action.

6. Plaintiff's action and the underlying Claim of Lien are premised upon a Settlement Agreement entered into between the parties on September 1, 1987. (Complaint, Exhibit A). Plaintiff contends that by the terms of the Settlement Agreement FSLIC is obligated to pay for improvements Hemmerle made on the Property (Complaint 11 29,30). However, the Settlement Agreement specifically provides that the improvements made on the property we " . . . at Borrower's [Acquisition Corp. of America's] sole cost and expense . . . " (emphasis added), which was agreed to by Hemmerle and plaintiff Sun-Island Realty, Inc. (Complaint, Exhibit A, p. 12). Thus, plaintiff's contention that defendant FSLIC is obligated to pay for the improvements allegedly made on the Property is belied by the very agreement which plaintiff contends such obligation arose.

7. Pursuant to the terms of the Settlement Agreement Hemmerle released and discharged defendant FSLIC from " . . . all . . . actions, cause and causes of actions, claims . . . suits . . . contracts . . . agreement . . . liens, claims of lien, damage . . . either now accrued or hereafter maturing . . . " (Complaint, Exhibit A, p. 15). By virtue of the aforestated release, this action must be dismissed.

8. Plaintiff's actions in recording the Claim of Lien and commencing this action in light of the foregoing constitutes willful and gross negligence as the constitute a fraudulent lien entitling defendant to damages pursuant to Florida Statute § 713.31(2)(c).

WHEREFORE, defendant FSLIC respectfully requests that this court enter an order dismissing the complaint and discharging the claim of lien, together with damages including costs and reasonable attorneys' fees.

Squire, Sanders & Dempsey
Attorneys for Plaintiff
320 Royal Poinciana Plaza
Palm Beach, FL 33480
(407) 832-6000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant's Motion to Dismiss Complaint and Discharge Lien was mailed this 19th day of December, 1988 to Lewis A. Berns, 808 Northeast Third Avenue, Fort Lauderdale, FL 33304

_____

Gary A. Woodfield

APPENDIX D

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SUN-ISLAND REALTY, INC., a Florida corporation, C/C/A, **KENNETH HEMMERLE**, D/B/A **HEMMERLE CONSTRUCTION CO.**,

Plaintiffs,

-VS- **CASE NO. CL-88-10252 (AO)**

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a United States corporation,

Defendant.
_____/

VERIFIED MOTION TO STRIKE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS BEING WHOLLY SHAM

Plaintiff, **KENNETH HEMMERLE**, D/B/A **HEMMERLE CONSTRUCTION CO.**, (hereinafter **HEMMERLE** for brevity), moves to strike Defendant's Motion for Summary Judgment as Being Wholly Sham, and as grounds therefore would show the following:

1. Defendant's allegation in its Paragraph I, which

states that Plaintiff's Claim of Lien was extinguished by the public sale of the property held on May 16, 1988, as a result of a Partial Summary Judgment of Foreclosure, is untrue and known to the Defendant to be untrue, and is alleged in an attempt to trick or deceive the Court and/or delay this action, when in truth and in fact, Defendant has full knowledge that the claim of lien resulted from a contract in which Defendant made it mandatory to improve the property subsequent to September 1, 1987 which followed the commencement of the action referred to in Paragraph 1986, some nine months prior to the commencement of the lien that forms the basis of this action.

2. Next, Paragraph 2 of Defendant's Motion states that the FSLIC is not contractually obligated to pay for the improvements allegedly made on the property. This allegation is another untruth, in that FSLIC is in direct privity with the contract that made it mandatory for such improvements. Further, at the time of the improvements the FSLIC had an equitable and beneficial interest in the land and

improvements.

3. In Paragraph 3 of Defendant's Motion, it is stated that Plaintiff is precluded by res judicata or collateral estoppel from raising the issues that support the lien foreclosure action. Again, this is a fictitious narrative in that HEMMERLE CONSTRUCTION CO. was never a party to any action that could relate to res judicata or collateral estoppel between the parties to this action.

4. In Paragraph 4 of Defendant's Motion, it is stated that any judgment in this action is subject to a complete set off as a result of a judgment previously entered in favor of the FSLIC and against KENNETH HEMMERLE in the sum of $14,l98,141.76. This Paragraph is also a blatant falsehood in that this judgment was improperly obtained and is now under appeal and is known by the Defendant to be improperly obtained. Further, in order to properly obtain this judgment, Defendant has filed another lawsuit for the same relief in Case No. CL 88-818 (AA).

5. In Paragraph 5, Defendant attempts to rely on the

settlement agreement entered into between Defendant and the other parties set forth in that paragraph. However, Defendant fails to inform the Court that the FSLIC breached this agreement

by not granting the agreed extension for final payment, and the

FSLIC has alleged that the other parties breached this agreement by not paying the agreed debt on or before December 31, l987. As a result of both parties breaching the agreement, the agreement is void or rescinded by consent.

6. Defendant in its final argument states that the Court lacks subject matter jurisdiction pursuant to 12 U. S. C. Section 1464 (d) (6) (c). This argument not only lacks merit, but it is well known to the Defendant that the United States Supreme Court has this month stated that such section does not deprive any Court of subject matter jurisdiction.

7. In support of Defendant's Motion for Summary Judgment, the Affidavit of attorney GARY A. WOODFIELD is offered. The affidavit is in itself a sham, in that it purports to

allege facts that could not be known by the affiant.

SUMMARY OF ARGUMENT

8. Following shortages in draw requests,and finally failing to fund the construction loan agreement, on March 26, l986, the FSLIC through their agent, Mr. David Hoyt, entered into an amendment to said loan agreement and by the terms of Paragraph 3(B) of the Amendment to the Loan Agreement which states that Lender wili finance the construction of the improvements with respect to Building Number I, Phase I, as defined in Exhibit "C" to the Declaration of Condominium of the project, in an amount not to exceed Two Million Two Hundred Fourteen Thousand Five Hundred Sixty Dollars, ($2,214,560.00), and that funding shall be

in accordance, setting forth the revised line item adjustments as

approved by the Lender. SUNRISE failed and refused to fund pursuant to the Amendment to the Loan Agreement.

9. By the terms of the Amendment to the Loan Agreement, two additional conditions were made by the

FSLIC through their agent Mr. David Hoyt, and the conditions were that first, it would be necessary for one of the parties representing ACQUISITION to purchase the shares of stock owned by RON MORRIS, and second, that SUN-ISLAND REALTY, INC. would become a guarantor to the Note and Mortgage as modified.

10. The parties representing ACQUISITION fully performed all of the conditions to be performed by them, but the FSLIC, SUNRISE and their agent failed and refused to fund the project as agreed by the terms of the Amended Loan Agreement.

11. Following the breach of the FSLIC and NEW SUNRISE, ACQUISITION, HEMMERLE and SUN-ISLAND REALTY, INC. filed suit in the Circuit Court for the Eleventh Circuit of Dade County, Florida. This action was subsequently transferred to Federal District Court and dismissed. Such dismissal is now under appeal to the United States Court of Appeal for the Eleventh Circuit.

12. On December 18, 1986, the FSLIC filed suit against

ACQUISITION, SUN-ISLAND and HEMMERLE in the Circuit Court of the Fifteenth Judicial Circuit, Case No. 86-11741 (CL) E. This action was filed to foreclose the original mortgage as modified by the amended loan agreement.

13. On September I, I987, the FSLIC through their agent, FADA, entered into a settlement agreement with ACQUISITION, SUN-ISLAND and HEMMERLE. The purpose of this agreement was to settle all disputes between the parties. As part of this agreement, the FSLIC had made certain claims of which ACQUISITION, SUN-ISLAND and HEMMERLE strongly denied, however, ACQUISITION, SUN-ISLAND and HEMMERLE agreed not to contest such claims as part of the settlement agreement provided that all conditions were met pursuant to the agreement. Due to the fact that there was a failure of consideration for the guarantee of SUN-ISLAND, the guaranty of SUN-ISLAND is not enforceable.

14. As part of the agreement, ACQUISITION agreed to continue construction of the improvements on the project

through HEMMERLE CONSTRUCTION CO., and to continue construction in accordance with the plans and specifications of the improvements. It was further agreed that the ongoing improvements pursuant to the settlement agreement would amount to $2,000,000.00. Certain conditions were agreed upon orally for the funding of the $2,000,000.00 in improvements, one of which was that the balance of utility improvements would be completed. As part of said utility improvements, ACQUISITION agreed to complete the main entrance road which would complete all of the utility improvements and would further release the completion letter of credit originally supplied by OLD SUNRISE for the benefit of ACQUISITION. Although the FSLIC agreed to assist HEMMERLE in obtaining permission from the County for the completion of the aforesaid road, FSLIC failed in that assistance which was necessary in that FSLIC was in possession of the OLD SUNRISE'S obligation by virtue of the letter of credit.

15. Another condition to the settlement was that

ACQUISITION would satisfy an agreed debt in the amount of $8,275,000.00 within 120 days of the execution of the agreement. At the time of execution of this settlement agreement, HEMMERLE requested additional time if necessary for the refinancing of the $8,275.000.00. The FSLIC through their agent, FADA, agreed to a short extension if needed for the funding of the $8,275,000.00. FADA informed the parties at the closing of the settlement agreement that this additional time could not be put in contract form due to the constraints of the FSLIC and a modification at this time would be far too time consuming. The FSLIC noted that the ongoing construction would prevent reservation buyers from canceling.

16. Notwithstanding FSLIC'S agreement to give ACQUISITION additional time for the funding of the $8,275,000.00, the FSLIC on request from ACQUISITION for additional time in which to close a new loan, said time being February 15, l988, the FSLIC failed and refused to grant any additional time exceeding the 120 days, and that payoff in

cash would be necessary on or before the 31st of December, 1987, thus creating a breach in the agreement.

17. Although the FSLIC foreclosure action had been pending since December, 1986, no action had taken place following the Settlement Agreement. At the time of the settlement agreement, ACQUISITION, through SUN-ISLAND paid over to the FSLIC, a partial payment of $82,750.00 leaving a balance of $8,192,250.00.

18. Between April, 1987 and December, 1987, SUN-ISLAND advanced to HEMMERLE CONSTRUCTION CO., an amount exceeding $1,886,560.00 for the improvements on the project. The advancement of these funds for the improvements were so advanced by virtue of the stipulation and settlement agreement entered into on September 1, 1987 by and between the FSLIC and ACQUISITION, SUN-ISLAND and HEMMERLE.

19. The FSLIC'S equitable and beneficial interest in the property at the time of the improvements in effect defines the FSLIC as an owner. By virtue of the Mechanics' Lien Law,

"Owner" means a person, party or entity who is the owner of any legal or equitable interest in real property, which interest can be sold by any legal process, thus, creates a situation where a mechanics' lien may attach to the equitable interest in the land, since the word "owner" includes the owner in equity as well as at law. See, **Amatrudi v. Blake**, 117 So. 2d 416 (Fla. 3rd DCA, 1960), holding that the beneficial interest in land created by a trust agreement that gave legal title to a bank is subject to a mechanics' lien. In the case at bar, the FSLIC and their predecessor "SUNRISE" had a beneficial interest in the land that is subject to the lien being foreclosed.

20. In addition to the beneficial interest of the FSLIC, the FSLIC was the party that created the necessity of the improvements by virtue of the settlement agreement, requiring and making in mandatory to make such improvements as a part of such settlement.

21. HEMMERLE CONSTRUCTION COMPANY and SUN-ISLAND REALTY, INC., as assignee and/or successor in interest to this contractor holds a valid lien on the real

property that forms the subject matter of the foreclosure action. The FSLIC, the present owner of the real property was in fact the responsible party for the creation of the lien due to the demands for such improvements, and Florida Law dictates that the lien attached to the property follows such property and any subsequent owner absent dissolution of said lien.

22. A right to lien exists on real property under the statute if a party performs services or labor or furnishes materials for the improvements to make the real property increase in value, or by order of the owner or any party who has an equitable or beneficial interest to the property. In other words, a lien may result either directly through privity of contract with the owner or derivatively from a contract between an owner and a party in interest such as the FSLIC.

23. It is clear that a party may obtain a mechanics' lien for labor or service performed or materials furnished in accordance with a contract, whether such contract be direct or not. A contract that requires a party to improve the real

property between the parties in interest is without doubt all that is required to create a lien on the improved property if the performing party is not paid for such improvements. In other words the lien that is being foreclosed was grounded on an express and implied contract between ACQUISITION CORP. OF AMERICA, the then owner, and the FSLIC, who had an equitable and beneficial interest in the property, the now owner.

24. By virtue of the settlement agreement between the FSLIC and ACQUISITION CORP. OF AMERICA, it was made abundantly clear that the FSLIC, as receivers for SUNRISE could upon default, become the owner of the real property. It was further made clear that the improvements performed by HEMMERLE were mandatory due to the insistence of the FSLIC and/or their agent, FADA, and as such, they were not only the contracting party, but were in direct privity with the contractor that made such improvements.

25. As has been noted, Plaintiffs have alleged that under the terms of the settlement agreement, the FSLIC

requested and required that improvements be made to the project in an amount of $2,000,000.00, these improvements were made pursuant to such requests, and as such the FSLIC is obligated to pay for such improvements due to being unjustly enriched.

26. The FSLIC claims that the claim of lien was extinguished by the public sale in their foreclosure action against ACQUISITION CORP. OF AMERICA. Nothing could be further from the truth. The prior foreclosure cannot adjudicate a mechanics' lien when the parties to such lien are not made a party to the foreclosure action. The foreclosure action was filed in December, l986, and sought to foreclose the claims of various defendants. HEMMERLE CONSTRUCTION COMPANY and its claim of lien were not made a part of said foreclosure action. Further, the foreclosure judgment did not adjudicate the lien that forms the subject of this action.

27. Due to the fact that the claim of lien in this action was never a part of the prior foreclosure action, the FSLIC took the property subject to the lien in this suit. HEMMERLE

CONSTRUCTION COMPANY acquired its rights to payment for improvements made to the project in an agreement with the FSLIC well after the foreclosure action was commenced. HEMMERLE CONSTRUCTION COMPANY was not made a party to such foreclosure action, nor was the claim of lien an issue in the prior foreclosure action, and as such the prior foreclosure decree does not affect the claim of lien being foreclosed therein.

WHEREFORE it is respectfully requested that the Court to enter an Order striking Defendant's Motion for Summary Judgment on the grounds that such motion is wholly sham and for such other and further relief as the Court deems right and proper.

_____

KENNETH HEMMERLE

STATE OF FLORIDA)

: SS

COUNTY OF BROWARD)

BEFORE ME, the undersigned authority, personally appeared KENNETH HEMMERLE, who after being first duly sworn according to law, deposes and says that he has full knowledge of the facts set forth in the above and foregoing motion and that such facts are true and correct to the best of his knowledge and belief.

_____

Notary Public

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Strike has been furnished to GARY A. WOODFIELD, ESQUIRE or Squire, Sanders & Dempsey, 320 Royal Poinciana Plaza, Palm Beach, Florida 33480 this_____day of March, 1989.

_____

KENNETH HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Fl 33304
Telephone: (305) 467-6801

APPENDIX E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

SUN-ISLAND REALTY, INC., a Florida corporation, C/S/A, **KENNETH HEMMERLE**, D/B/A **HEMMERLE CONSTRUCTION CO.**,

Plaintiffs,

-VS- CASE CL-88-10252 (AN)

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a United States corporation,

Defendant.

_____/

SUMMARY FINAL JUDGEMENT

This cause came before the court for consideration of the Renewed Motion for Summary Judgement filed by defendant, the Federal Deposit Insurance Corporation, as Receiver for Sunrise Savings and Loan Association ("FDIC")/ The Court has reviewed the motion and memoranda submitted in support of and in opposition thereto, has heard argument of counsel, and has reviewed the file and become otherwise fully advised in the premises. The Court finds as

follows:

FINDINGS OF FACT

1. On December 15, 1983, Acquisition Corp of America ("Acquisition") executed and delivered to FDIC's predecessor, Sunrise Savings and Loan Association of Florida, a promissory note and a mortgage on certain real property in Palm Beach County, Florida (the "property"). Payment of the loan was guaranteed by plaintiff Sun-Island Realty, Inc. ("Sun-Island") and Kenneth V. Hemmerle ("Hemmerle").

2. On December 18, 1986, FDIC's predecessor, the Federal Savings and Loan Insurance Corporation, as Receiver for Sunrise Savings and Loan Association ("FSLIC") sued Acquisition, Hemmerle, Sun-Island and other to foreclose the mortgage and to enforce the terms of the note and the guarantees.

3. On September 1, 1987, FSLIC, Acquisition, Sun-Island and Hemmerle entered into a written settlement agreement and stipulation (collectively the "Agreement") to

resolve all outstanding disputes between the parties. The Agreement provided, inter alia, for entry of a judgement of foreclosure against Acquisition, without notice or hearing, if FSLIC had not received payment of $8.2 million on or before December 31, 1987. Additionally, Hemmerle and Sun-Island executed and delivered to FSLIC a conditional guarantee of payment, guaranteeing payment of the debt owed FSLIC in the event, inter alia, Acquisition should seek bankruptcy relief.

4. On December 30, 1987, Acquisition filed a Chapter 11 bankruptcy petition.

5. On December 31, 1987, Hemmerle, d/b/a Hemmerle Construction Co., recorded the claim of lien which is the subject of this action in the amount of $1,886,560 on the property. Thereafter, Hemmerle, d/b/a/ Hemmerle Construction Co., assigned the claim of lien to Sun-Island.

6. FSLIC did not receive any payment due pursuant to the Agreement by December 31, 1987.

7. Pursuant to the agreement, and after obtaining stay relief from the bankruptcy court, FSLIC obtained a partial

summary judgement of foreclosure as to the property. Following a public sale of the property, FSLIC took title to the property in May, 1988.

8. In January 1988, FSLIC commenced an action against Hemmerle and Sun-Island to enforce the terms of the conditional guarantee of payment executed in connection with the Agreement. FSLIC v Sun-Island Realty, Inc. and Kenneth Hemmerle, Case No. 88-818, in the Circuit Court of Palm Beach County, Florida ("Case no. 88-818") Sun-Island and Hemmerle answered the complaint and asserted numerous affirmative defenses and counterclaims arising from FSLIC's alleged breach of the Agreement. In its breach of contract claim, Sun-Island sought damages exceeding $1.9 million based on alleged improvements it had made to the property. Hemmerle asserted a claim for breach of the Agreement as well. Sun-Island and Hemmerle also asserted defenses and counterclaims of fraud and fraudulent inducement in connection with the execution and performance of the Agreement. All of the parties

counterclaims except breach of contract claims asserted by Hemmerle and Sun-Island, judgment was entered on jury verdicts in favor of Sun-Island and Hemmerle awarding Sun-Island $1.9 million and awarding Hemmerle $25 million.

9. In December 1988, Sun Island commenced this action, seeking foreclosure of the claim of lien, asserting that it made improvements to the property in excess of $1.9 million pursuant to the Agreement. Sun-Island also asserted claims of fraud in the inducement, quantum meruit, assumpsit and breach of contract. All of Sun-Island's claims were predicated on its allegations that FSLIC fraudulently breached the Agreement.

10. Hemmerle has at various times during the course of these proceedings sought to intervene as a part plaintiff herein. No Order has been entered with regard to Hemmerle's requests to intervene. To the extent Hemmerle is considered a party plaintiff to this proceeding, this judgement applies to him as well as Sun-Island.

CONCLUSIONS OF LAW

Sun-Island and Hemmerle have already litigated their claims arising from assertions that FSLIC breached the Agreement by failing to pay for improvements Sun-Island made to the property. Consequently, they are precluded from maintaining another suit for the same relief pursuant to principles of res judicata and estoppel by judgement. Wise v Tucker, 399 So 2d 500 (Fla. 4th DCA 1981). The parties claims in this case and their counterclaims in case no. 88-818 are ultimately concerned with execution and performance of the Agreement. Since those claims were disposed of in case no. 88-818, principles of res judicata and collateral estoppel apply to bar another suit based on the same claims, Wise v Tucker, supra.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that FDIC's Motion for Summary Judgement is hereby granted and plaintiffs shall take nothing by this action and defendant FDIC shall go hence without day.

DONE AND ORDERED in Chambers, West Palm

Beach, Palm Beach County, Florida on _____ day of _____, 1991.

_____

CIRCUIT COURT JUDGE

Copies Furnished to:

Suzanne H. Youmans, Esquire
Squire Sanders & Dempsey
320 Royal Poinciana Plaza
Palm Beach, Florida 33480

Richard G. Doggett, Esquire
808 N.E. 3rd Avenue
Fort Lauderdale, FL 33304

Kenneth Hemmerle
808 N.E. 3rd Avenue
Fort Lauderdale, FL 33304

APPENDIX F

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

SUN-ISLAND REALTY, INC., a Florida corporation, C/C/A, **KENNETH HEMMERLE**, D/B/A **HEMMERLE CONSTRUCTION CO.**,

Plaintiffs,

-VS- **CASE NO. CL-88-10252 (AN)**

THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a United States corporation,

Defendant.

_____/

MOTION FOR REHEARING AND/OR RECONSIDERATION

Pursuant to the letter of this Court, Plaintiffs' SUN-ISLAND REALTY, INC., (hereinafter "SUN") and KENNETH HEMMERLE (hereinafter HEMMERLE) files this their Motion for Rehearing and/or Reconsideration of the Order Granting Summary Final Judgement in favor of the defendant, and in support hereof would show unto the Court the following:

ARGUMENT RES JUDICATA

The Court granted Summary Judgement on the basis

of the doctrines of res judicata and estoppel by judgement, and in support cited Wise v. Tucker, 399 So. 2d 500 (Fla. 4th DCA 1981). In the conclusions of law and the grant of Summary Judgement the Court overlooked that in order for the doctrine of "res judicata" to bar a subsequent suit certain prerequisites must be met. The law with respect to the doctrine of res judicata is well settled. The legal percept comprehended in the phrase "res judicata" is defined as the doctrine that an existing final judgement or decree rendered on the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of the rights, questions and facts in issue, as to the parties and their privies, in other action in the same or in another court. The judgement or decree puts at rest and entombs all justiciable issues. By this Court's conclusion of law regarding "res judicata", it appears that it overlooked the material fact that neither SUN or HEMMERLE has ever had a day in court regarding the Mechanic Lien foreclosure. Next, the Court overlooked that a judgement not rendered on the merits, or without fraud or

collusion cannot be the basis of "res judicata" in which to bar a subsequent suit. In stating the doctrine of res judicata, the courts must refer to the fact that an adjudication sought to be used as a basis of the doctrine was rendered upon the merits. It is clear, that not only was the judgment sought to be used in support of res judicata, not rendered upon the merits, it was a stipulated judgement obtained by fraud, as such, presents a question of fact precluding summary judgement. It is well settled that for "res judicata" to bar a suit, four identities must be present: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the person and parties, and (4) the identity of the quality or capacity of the persons for or against whom the claim is made. It is clear that none of the four identities are present in which to apply the doctrine of res judicata to the cause sub judice. It is an absolute rule that a judgement or decree rendered on any grounds which do not involve the merits of the action may not be used as the basis for the operation of the doctrine of res judicata. Allbright v Hanft, 333 so 2d 112

(Fla. 2d DCA 1976). The former adjudication in regards to HEMMERLE which Defendant attempts to use as the basis of res judicata was based on a breach of contract claim which differs from the present claims, and as such, cannot be deemed on the merits. O'Neal v Percival, 25 FLA. 118, 5 So. 809 (1889).

In Sunshine Utilities Equipment, Inc. v Treasure Coast Utilities, Inc., 421 So. 2d 1096 (Fla. 4th DCA 1982), in reversing, the Fourth District Court of Appeal held that: (1) In identifying the issues previously adjudicated, in order to apply doctrine of res judicata or estoppel by judgement, the Court may consider only the record of the prior action and that the same principle applies to the doctrine of merger, and (2) the trial court erred by considering extrinsic evidence concerning the prior judgement. It is clear that the record of the prior action was not made part of this action, nor was the prior issues framed by the Defendant or tendered by the pleadings and put in issue in this cause. In Culloden v Music, 226 So. 2d 240, 244 (Fla. 2d DCA 1969) the court reversed holding

that "The test with reference to res adjudicata or estoppel by judgement is, and should be, whether the evidence in both cases is in essence the same albeit under estoppel by judgement it must be determined that every point and question presented in the second action was actually litigated and decided in the first. We hold the view that the expression 'precise facts' has been, and should be, given the same signification as the words 'every point and question'." In treating the definition of "Res Adjudicata" (1) This doctrine "is not controlling except in an instance wherein the second suit is between the "same parties" and is predicated upon the "same cause of action" as was the first." In Seaboard Coast Line Railroad Co. v Industrial Contracting Co., 260 So. 2d 860 (Fla. 4th DCA 1972) the Court reversed summary judgement holding that to bring the doctrine of res judicata into valid play there must be: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the person and parties to the actions; and (4) identity of the quality or capacity of the person for or against whom the claim is

made. If these condition "do no concur", the doctrine of res judicata is "not applicable", citing Matthews v Matthews, 133 So. 2d 91, at p. 94. In Youngbloud v Taylor, 89 So. 2d 503 (fla. 1956) the Supreme Court held that judgement for defendant in an action brought by father on behalf of his son as a next friend, arising out of the same accident for which father brought an action in his own behalf for damages recoverable by him as a result thereof, did not estop father from maintaining subsequent action against defendant on his own account since father, as next friend, was not a real party to the first suit and therefore there was no identity of the parties-plaintiff in the two actions. As in the case at bar, Hemmerle Construction Co. has never been a party to any action where the defendant was a party, and that the claim of lien is that of Hemmerle Construction Co., notwithstanding that the proceeds have been assigned to SUN for sums of money owed to SUN. Likewise, SUN has never been a party to any action between the herein named defendant, with the exception of the FSLIC v Sun-Island Realty Inc. and Kenneth

Hemmerle, Case No. 88-818. Although SUN sought damages in the amount of $1.9 million, the damages sought in that case were based upon a breach of contract and not the foreclosure of a mechanic lien. Thus, the identities required for the purpose of res judicata are missing and as such the doctrine of "res judicata" will not apply.

ARGUMENT AS TO COLLATERAL ESTOPPEL

Collateral Estoppel, sometimes referred to a Estoppel by judgment is akin to the doctrine of "res judicata". Collateral Estopped and Estoppel by Judgement require that the real parties in interest in both suits be identical and that the issue in the second action that is sought to be estopped from relitigation be identical to necessary and material issues resolved in the first suit. It is clear that at no time has a mechanic lien foreclosure between the parties to this action and that of any other action been resolved or tried. It is well settled that for a judgement in a prior action operate as an estoppel, it must be only on those matters in issue or the points controverted, on the determination of which the finding

was rendered or those right or issues necessarily involved in the conclusion reached. Since no conclusion has ever been reached in regard to the mechanic lien foreclosure, the doctrine of collateral estoppel will not apply to bar the subsequent action for such foreclosure. While the principle of collateral estoppel is applicable where the two causes of action are different, in which case the adjudication in the first suit only estopps the parties from litigation in the second suit issues or question common to both causes of action, which were actually adjudicated in the prior litigation. Seaboard C.L.R. co. v Industrial Contracting Co., 260 So 2d 860 (Fla. 2d DCA 1972); Seaboard Coast Line R. Co. v Cox, 338 So. 2d 190 (Fla. 1976). In Newport Division, Tenneco Chem., Inc. v Thompson, 330 So 2d 826 (Fla. 1st DCA 1976) the court held that "the mutuality doctrine is but one application-in favor of the party who was present at the prior judgement, against one who wasn't-of the well-settled rule that there must be an "identity of persons and the parties to the action" for an estoppel to arise. Citing Daigneau v National Cash Register

Co., 247 So. 2d 465 (Fla. 4th DCA 1971). In Krug v Meros,468 So. 2d 299 (Fla. 2d DCA 1985) the court held that where issue is not litigated in prior suit, estoppel by judgement does not arise.

Although, Defendant's argument in support of the doctrine of res judicata and collateral estoppel appear to be grounded on the breach of contract suit in Case No. 88-818, it is clear that the issues raised by the complaint in this action was not litigated in that action. In Allstate Insurance co v A.D.H., Inc., 397 So 2d 928 (Fla. 3d DCA 1981) the court reversed holding that in action by contractor against carpentry and masonry subcontractors for indemnity, defense of estoppel by judgement was not proven by equivocal jury verdict in prior action by widow of employee killed at a job sit against contractor. As in the case at bar, the issue was not before the court or jury in which to make a determination regarding the mechanic lien. Furthermore, the jury verdict in that action awarding SUN $1.9 million dollars has since been reversed by the 4th DCA, and as such Defendant's original

claim as to that verdict being the amount determined by the jury is the same as the amount claimed in this case now loses all validity attempted by the Defendant in its motion for summary judgement.

Even the case cited in support of Defendant's Motion for Summary judgement, Wise v Tucker, defeats their motion. It is clear that the Defendant has never raised the affirmative defense of res judicata or collateral estoppel, and as such is precluded from arguing its existence in this action. Headnote 2, Wise. Doctrine of estoppel by judgement applies where two suits involve different causes of action and precluded relitigation of those issues which were actually litigated and determined in the prior action and, thus, where two suits were based on common question, estoppel by judgement will prevent defendant from maintaining later One. Headnote 4, Wise. It is clear that the issue of mechanic lien foreclosure has never been litigated, and as such Wise would defeat summary judgement.

It is well settled that a "contractor" who complies with

all provisions of the Mechanics' Lien Law and has substantially preformed improvements on real property, is entitled to a mechanics' lien. Florida Statutes, Section 713.05. It is clear that pursuant to the Settlement Agreement entered into on September 1, 1987, and by the terms of that agreement, ACQUISITION CORP OF AMERICA (hereinafter ACA) contracted with Hemmerle Construction pursuant to the demands of the FSLIC for certain improvements on the subject property that formed the subject of the Mechanic Lien. Hemmerle Construction has not been paid one cent pursuant to the agreement between the FSLIC and ACA. Although demand has been made for such improvements, and the fee owner, the Defendant in this cause, is obligated for the performance of labor and materials pursuant to that agreement. It is clear that by the terms of the settlement agreement, an agency relationship existed between the FSLIC and ACA, and as such the Defendant cannot now argue that it is not obligated for the amount due on the mechanic lien.

WHEREFORE, premises considered, it is respectfully

requested that a rehearing be had or reconsideration of the Order of Summary Final Judgement, and that such be revised as to both law and fact, believing that a re-examination of the record made by the Court in Case No. 88-818 will result in a revision of the present order, and that a miscarriage of justice will occur if the Summary Final Judgment is not vacated.

KENNETH HEMMERLE,
d/b/a HEMMERLE CONST. Co.
808 N.E. Third Avenue
Fort Lauderdale, FL 33304
305-467-6801

RICHARD G. DOGGETT, Esq.
808 N.E. Third Avenue
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305-767-9055
Florida Bar No. 301426

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing and/or Reconsideration has been furnished facsimile transmission this 20th day of November, 1991, to SUZANNE H. YOUMANS, ESQ., FAX NO. 407-832-0085.

KENNETH V. HEMMERLE

RICHARD G. DOGGETT, Esq.

APPENDIX G

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SUN-ISLAND REALTY, INC., a
Florida corporation, C/S/A
KENNETH HEMMERLE, D/B/A
HEMMERLE CONSTRUCTION CO.,

Plaintiffs, Appellants,

-VS- CASE NO. CL-88-10252-AN

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for
SUNRISE SAVINGS AND LOAN
ASSOCIATION,

Defendant, Appellee.
/

NOTICE OF APPEAL

NOTICE IS GIVEN that SUN-ISLAND REALTY, INC., and KENNETH HEMMERLE, Plaintiffs, Appellants, appeal to the District Court of Appeal, Fourth District of Florida, the Summary Final Judgment entered the 14th day of November, 1991, and the Order denying Plaintiffs' Motion for Rehearing and Reconsideration dated the 17th day of December, 1991. the nature of the Order entered the 14th day of November,

1991, is a Final Order of Summary Judgment, and the nature of the Order dated the 17th of December, 1991, is a Final Order denying Rehearing and/or Reconsideration.

KENNETH HEMMERLE, pro se
808 Northeast 3rd Avenue
Fort Lauderdale, FL 33304
Telephone: (305) 467-6801

RICHARD G. DOGGETT, P.A.
808 N.E. 3rd Ave.
Fort Lauderdale, FL 33304
(305) 767-9055
Attorney for Sun-Island Realty

By_____
RICHARD G. DOGGETT, ESQ.
Florida Bar No. 301426

APPENDIX H

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 92-0063

L. T. CASE NO. 88-10252 (AN)

SUN-ISLAND REALTY, INC.,
and KENNETH HEMMERLE

Appellants,

-VS-

FEDERAL DEPOSIT INSURANCE
CORPORATION, etc.,

Appellees.

INITIAL BRIEF OF APPELLANTS

Appeal from the Fifteenth Judicial Circuit Court in and for Palm Beach, County, Florida

KENNETH HEMMERLE, Appellant
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Telephone: (305) 467-6801

RICHARD G. DOGGETT,
Counsel for SUN-ISLAND
808 Northeast Third Ave.
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(305) 767-9055

STATEMENT OF THE CASE

On September 1, 1987, The Federal Savings and Loan Insurance Corporation (FSLIC) entered into an agreement with Acquisition Corp. of America (ACA); Sun-Island Realty, Inc. (SIR); and KENNETH HEMMERLE (Hemmerle), whereby it was agreed between the parties that ACA would improve certain real property during a 120 day period, which improvements would total $2,000,000.00.

ACA contracted with KENNETH HEMMERLE d/b/a HEMMERLE CONSTRUCTION CO., for such improvements. HEMMERLE improved the real property known as the Costa Del Sol project in an amount exceeding $1,886,000.00, of which ACA was unable to pay, and the FSLIC failed and refused to pay notwithstanding it was the FSLIC'S requirement for the improvements made to the property that is now owned by the FSLIC'S successor in interest as receiver for Sunrise Savings and Loan Association, the Federal Deposit Insurance Corporation (FDIC).

Following refusal to pay by both ACA and the FSLIC

for the improvements made by HEMMERLE, with funds borrowed SUN-ISLAND on October 30, 1987, HEMMERLE filed a Mechanic's Lien on the subject property. Pursuant to an agreement with SUN-ISLAND, HEMMERLE assigned the rights of the proceeds to SUN-ISLAND with an agreement to prefect his lien. (Exhibit to the Complaint R-1-46), and on November 2, 1988, HEMMERLE filed a Lis Pendens on the subject property (R-47).

On December 19, 1988, the FSLIC filed a Motion to Dismiss Complaint and Discharge the Mechanic Lien (R-48-51), and on January 13, the Court below denied the FSLIC'S Motion to Dismiss and Discharge Lien. Following the Court's Order denying said motion, the FSLIC filed its Answer and Affirmative Defenses (R-53-57).

On February 23, the FSLIC filed a Motion for Summary Judgment (R-58-59). On March 24, 1989, and Affidavit of **Gary A. Woodfield** was filed in support of the FSLIC'S Motion for Summary Judgment (R-63-100).

On April 4, 1989, Plaintiffs' filed a verified Motion to

Strike Defendant's Motion for Summary Judgment as being wholly sham (R-106-113).

On April 10, 1989, the FSLIC filed a Motion for leave to Amend Affirmative Defenses (R117-123), and on April 26, 1989 Plaintiffs entered into an agreed order on the FSLIC'S Motion to Amend Affirmative Defenses (R-127). On April 27, 1989, the FSLIC'S Amended Affirmative Defenses and additional exhibits were filed (R-128-132).

Following the filing of the Amended Affirmative Defenses, on June 30, 1989, the FSLIC filed an Amended Motion for Summary Judgment (R-133-218), and on July 21, 1989, the Plaintiffs filed a response to the amended motion for summary judgment (R-226-233). Following an Order setting special hearing on the FSLIC'S Amended Motion for Summary Judgment, to be heard on November 8, 1989, and following the hearing on said motion, the Court ordered Memorandum of Law as to Count I of Plaintiffs' Complaint, which was filed on November 17, 1989 (R-239-247).

On November 17, 1989, the court denied the FSLIC'S

Motion for Summary Judgment.

On January 4, 1992, the Court entered its Order setting Jury Trial on the Calendar beginning July 1, 1991 and directing pretrial and mediation procedures (R-364-366).

On February 5, 1991, the FSLIC filed a renewed Motion for Summary Judgment, together with a memorandum in support thereof (R-367-449). And on February 7, 1991, the FSLIC filed a Motion to Strike the case from jury docket (R-450-453).

On February 19, 1991 Plaintiffs filed their Response to the FSLIC'S renewed Motion for Summary Judgment (R-454-462).

On September 11, 1991, HEMMERLE filed an Affidavit in Opposition to the FSLIC'S Renewed Motion for Summary Judgment. And on the 19th of September, 1991, the Court ordered Memoranda from the FSLIC (R-481-482). On October 7, 1991, the FSLIC filed a Supplemental Memorandum in Support of its Renewed Motion for Summary Judgment with certain exhibits attached thereto (R-483-494). And on October

8, 1991, the Plaintiffs filed a Reply to the FSLIC'S Supplemental Memorandum (R 495-506).

On November 14, 1991, the Court granted the FSLIC'S Renewed Motion for Summary Judgment. On November 21, 1991, the Plaintiffs filed a Motion for Rehearing and/or Reconsideration setting forth facts that Summary Judgment once denied, cannot subsequently be granted without new proofs. On December 17, 1991, the lower Court denied Plaintiffs Motion for Rehearing and/or Reconsideration.

It is from the Order of Summary Judgment and the Order denying Plaintiffs Motion for Rehearing, that Appellants have taken this appeal.

STATEMENT OF THE FACTS

There has never been a dispute as to whether or not HEMMERLE performed the improvement which gave rise to the filing of the Mechanic Lien. It has been the FSLIC'S contention that they were not responsible for the indebtedness created by ACA for the improvements made on the subject property, notwithstanding the improvements were

made pursuant to the orders of the FSLIC that was embodied in the unilateral agreement, drafted by the FSLIC through their agents the Federal Assets Disposition Association (FADA).

The FSLIC (hereinafter FDIC) conclusion in its Renewed Motion for Summary Judgment, that the Claim of Lien was subordinate to the FSLIC'S interest in the property and was extinguished by the foreclosure sale and subsequent issuance of the Certificate of Title to the FSLIC was meritless in that it had been determined by the FSLIC'S initial Amended Motion for Summary Judgment (R-248).

It is clear that pursuant to the FSLIC'S request and demand by its unilateral contract, the borrower (ACA), by virtue of that request and demand, contracted with HEMMERLE CONSTRUCTION CO., for the improvement demanded by the FSLIC.

In the FSLIC'S Renewed Motion for Summary Judgment it was argued that new proofs were submitted at hearing on said motion. A review of the Record will establish

that no new proof were ever submitted which is required upon a moving party in a second attempt for Summary Judgment.

The FSLIC'S alleged new proof was that the Judgment entered on September 19, 1989, in Case No. 88-818, was a basis of res judicata and/or estoppel by judgment, and such reasoning was that judgment entered against the FSLIC, was for the same improvements that gave rise to the Claim of Lien. The record reveals that even if the argument of res judicata and/or estoppel by judgment stemming from Case No. 88-818 were for the same improvements, which Plaintiffs strongly denied, the amended motion for summary judgment that was heard and denied on November 9, 1989 was some 55 days after the jury entered its verdict in Case No. 88-818. The FSLIC could have at any time from the jury verdict to the date of hearing on its amended motion included the argument of res judicata and/or estoppel by judgment.

Although the judgment in Case No. 88-818 has been reversed by this Court, such reversal surely defeats the

argument of payment pursuant to that judgment, and even if this Court had affirmed the jury verdict in Case No. 88-818, that judgment was for Breach of Contract and had no connection with the Mechanic Lien Foreclosure action (R-495-506).

The FSLIC'S reliance on the doctrine of res judicata and/or estoppel by judgment is clearly misplaced, in that not only was the cause of action different in this case as opposed to Case No. 88-818, but the parties were also different. Neither of the two cause of action share together or have unity of interest (R-495-506).

The Summary Final Judgment, the findings of fact, and the Court's Conclusions of Law, as drafted and submitted by the FDIC, is on its face contrary to the general principals that support a motion for summary judgment. The purpose of summary judgment is to determine if there is sufficient evidence to justify a trial on the issues made by the pleadings, and must appear from the pleadings, depositions, affidavits, or other evidence before the court that there exists

no genuine issue of material fact to be tried. A review of the Findings of Fact, paragraph 1 through 10 of the Summary Final Judgment, clearly show genuine issues of material fact. There is no evidence in the record which would establish the findings of fact included in the Summary Final Judgment. Such factual issues as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are functions for the trier of fact, and it appears that the finding of fact included in the Summary Final Judgment are in fact genuine issues of fact to be determined by a trier of fact (R-524-528).

The Conclusions of Law incorporated in the Summary Final Judgment, are not conclusions of law, but rather additional factual issues which should preclude a summary final judgment. Whether or not the parties' claims in the case **sub judice** and their counterclaims in Case No. 88-818 were in fact disposed of, and that the principles of res judicata and collateral estoppel apply to bar the suit below, is a matter of fact to be determined by the trier of fact (R-524-528).

STATEMENT OF ISSUES

The Court below committed reversible error in entering Summary Final Judgment on four major grounds:

(1) The lower Court erred in determining that new proof were submitted by the FDIC in its Renewed Motion fo Summary Judgment. It is clear that no new proof were submitted at the hearing on the FDIC'S Renewed Motion for Summary Judgment, and the sole basis of argument by the FDIC was res judicata or estoppel by judgment stemming from Case No. 88-818. Clearly, a genuine issue of material fact.

(2) The lower Court erred in its determination that the judgment entered September 19, 1989, in Case No. 88-818, was the basis of res judicata ~~and/or estoppel by judgment~~, and that such judgment could not have been argued in its initial motion for summary judgment that was denied.

(3) The lower Court erred in its determination that it is incumbent upon the non-moving party to show the existence of genuine issues of material fact, and not on the moving

party to show an absence of genuine issues of material fact.

(4) The lower Court erred in its determination that the claims in the case **sub judice** and the claims in Case No. 88-818 were the same, and that breach of contract and mechanic lien foreclosure are in fact the same, and relied upon the naked allegations of the FDIC that such were the same.

SUMMARY OF ARGUMENT

The FDIC submitted a supplemental memorandum in support of it's Renewed Motion for Summary Judgment as requested by the Court (R-483-494). This memorandum included each and every allegations and/or proof relied upon for the support of its renewed motion.

In paragraph 1, of said memorandum, the FDIC attempted to argue that new proofs were submitted at hearing on the Renewed Motion for Summary Judgment. It was clear that no new proof were submitted at that hearing, and the only basis of argument was that the doctrine of res judicata or estoppel by judgment applied stemming from Case No. 88-818 to support said motion.

Next, the FDIC, mislead the lower Court by alleging that the judgment entered September 19, 1989, in Case No. 88-818, was an absolute basis of res judicata and/or estoppel by judgment, and that such allegations were made part of its renewed motion for summary judgment, and was well after the filing of the FDIC'S first motion for summary judgment. The FDIC further argued that the existence of the judgment in Case No. 88-818 and the arguments directed to that judgment were not, and could not have been set forth in its first motion. Clearly, the record reveals that the judgment in Case No. 88-818 was in fact available in the first motion. The order setting special hearing on the first amended motion for summary judgment was entered August 18, 1989 (R-238), scheduling the FDIC'S Amended Motion for Summary Judgment to be heard on Wednesday, November 8, 1989 at 9:30 a.m., some 55 days after the jury entered its verdict in Case No. 88-818. The FDIC at any time from the date of the jury verdict to the hearing on it's amended motion for summary judgment could have included the jury verdict in the

amended motion if such verdict was in fact a determination of the same issues as in the case **sub judice** in which to give rise to the doctrine of res judicata or estoppel by judgment. Clearly, the jury verdict found damages for breach of contract and not a mechanic lien foreclosure.

In paragraph 2 of the FDIC'S memo, it is alleged that Plaintiffs failed to show the factual dispute. Although Plaintiffs have shown by allegations of their complaint and subsequent memorandum, the factual disputes the FDIC failed to recognize, the Appellants would argue that is not incumbent upon the non-moving party to show anything whatsoever. It is clear that the burden is on the moving for summary judgment to establish the absence of any issue of material fact, and the party against whom summary judgment is sought is not required to file any opposing affidavits or demonstrate the existence of an issue of material fact in order to avoid having a summary judgment rendered. It is sufficient for the non-moving party to disclose intentions to offer proof of facts, in good faith, which, if those facts contradict the facts

to be adduced in evidence by the adversary, and/or to present such fact to a jury, would preclude summary judgment.

In paragraph 3 of the FDIC'S memorandum, it is claimed that the claims in Case No. 88-818, are the same as those asserted in the case sub judice, and that Plaintiffs' assertion to the contrary is blatantly incorrect. Appellants' in their reply to the FDIC'S supplemental memorandum (R-495-506) requested a review of Sun-Island's Counterclaim in Case No. 88-818, and the Complaint in the case which summary judgment was entered, which would show that not only are the claims different, and that the claim in the case sub judice is for mechanic lien foreclosure, and the claims in Case No. 88-818 was for breach of contract. Furthermore, the parties are different, in that KENNETH HEMMERLE, d/b/a/ HEMMERLE CONSTRUCTION CO., has never been mentioned in any other action involving the FDIC, the FSLIC or any of it's predecessors in interest. Breach of Contract and Mechanic Lien Foreclosure are not required to be brought in

the same suit, and it is clear that the term "contract" has been defined as a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Whereas the Mechanics' Lien Law finds section in the dictates of natural justice and in the equitable principle that everyone who, by his labor or materials, has contributed to the preservation of enhancement of the property of another, and as such, thereby acquires a right to compensation. Neither of the two cause of action share together or have unity of interest whereby, the lien foreclosure could have or should have been concluded in Case No. 88-818, and as such, neither res judicata or estoppel by judgment would apply to the case at bar. As shown in the FDIC'S memorandum, the special interrogatory verdict forms upon which judgment was entered in Case No. 88-818, established that the ultimate issue addressed in that case, were and are different than the issues claimed in the Court below. The FDIC'S argument that because the jury awarded $1.9 million in damages for the

FSLIC'S breach of payment in Case No. 88-818 was and is the same as the claim of lien for $1,886,000.00, which formed the claim of lien that is the subject of the case sub judice. The trial court relied on this assertion made in the FDIC'S memorandum, and entered Summary Final Judgment, which on it's face is error.

Again, the case on appeal is for Mechanic Lien Foreclosure and not Breach of Contract as argued by the FDIC. An issue of fact arises as to whether any part of the judgment in Case No. 88-818 could be made to satisfy the mechanic lien placed on the property well prior to Case No. 88-818. If it is the FDIC'S argument and belief that such judgment or any part thereof would be applied to satisfy the claim of lien in the suit below, than it would be incumbent upon the FDIC to prove such a claim to a trier of fact and not by the way of summary judgment.

Although, the FDIC cites Wise v. Tucker 399 So. 2d 500, 502 (Fla. 4th DCA 1981) for the proposition that two suits based on a common question bars a later action, and the

lower court relied on such argument when granting Summary Final Judgment, finding that even if the causes of action differ in the two suits the doctrine of estoppel by judgment would apply. The FDIC'S argument and the Court's findings and conclusions in that regard is misplaced, in that in Wise the Court reversed holding that the doctrine of estoppel by judgment applies where two suits involve different causes of action and precludes relitigation of those issues which were actually litigated and determined in the prior action. It is clear that the Mechanic Lien Foreclosure action has never been litigated or determined in any action, and it is further clear Plaintiff, lienor, HEMMERLE CONSTRUCTION CO., has never been a party to any action with the FDIC, the FSLIC, or any predecessor of interest. Next, the lower court relied on the FDIC'S argument and reliance on New River Yachting Center v. Bacchiocchi, 407 So. 2d 607, 609 (Fla. 4th DCA 1981). Again, misplaced, in that the holding in New River supports Plaintiffs' position, holding "Once a party has had an opportunity to litigate a matter in an action in a court of

competent jurisdiction, he should not be permitted to litigate it again to the harassment and vexation of his opponent." At the time Plaintiffs in the case sub judice filed it's Counterclaim in Case No. 88-818, the foreclosure action had already been filed, and as such could not be brought in Case No. 88-818. Case No. 88-818 did not address the Lien Foreclosure action, and could not have addressed such an action, in that Plaintiffs' Counterclaim in Case No. 88-818 was a compulsory counterclaim which arose from the case in chief, and this action could not be permitted in the prior action, either as a compulsory or permissive counterclaim, being removed from a Breach of Contract action. Had the FDIC (FSLIC), the Plaintiff in Case No. 88-818 wanted to try the foreclosure action in Case No. 88-818, they could have moved to consolidate. It is unclear to the Appellants how the FDIC coerced the lower court to believe that the Lien Foreclosure action could have been tried in Case No. 88-818, and that because it was not tried in Case No. 88-818, the cause became res judicata or estoppel by judgment.

ARGUMENT

POINT I ON APPEAL

DID THE VERDICT IN CASE NO. 88-818 IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT FOR BREACH OF CONTRACT BAR THE LIEN FORECLOSURE ACTION IN THE CASE ON REVIEW?

APPELLANTS' ANSWER: NO. The Court granted Summary Final Judgment on the basis of the doctrines of res judicata and estoppel by judgment, and in support of the Summary Final Judgment relied upon **Wise v. Tucker**, 399 So. 2d 500 (Fla. 4th DCA 1981). In the conclusions of law and the grant of Summary Judgment the lower Court overlooked such facts that for the doctrine of "res judicata" to bar a subsequent suit certain prerequisites must be met. The law with respect to the doctrine of res judicata is well settled. The legal precept comprehended in the phrase "res judicata" is defined as the doctrine that an existing final judgment or decree rendered on the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of the rights, questions and facts in

issue, as to the parties and their privies, in other action in the same or in another court. The judgment or decree puts at rest and entombs all justifiable issues. By the lower Court's conclusion of law regarding "res judicata", it appears that it overlooked the material fact that neither **SUN-ISLAND or HEMMERLE** has ever had a day in court regarding the Mechanic Lien foreclosure. Next, the lower Court overlooked the fact that a judgment not rendered on the merits, or without fraud or collusion cannot be the basis of "res judicata" in which to bar a subsequent suit. In stating the doctrine of res judicata, the courts must refer to the fact that an adjudication sought to be used as a basis of the doctrine was rendered upon the merits. It is clear, that not only was the judgment sought to be used in support of res judicata not an issue in the case **sub judice**, it has since been reversed by this Court. It is well settled that for "res judicata" to bar a suit, four identities must be present: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the person and parties, and (4) the identity of the quality or

capacity of the persons for or against whom the claim is made. It is clear that none of the four identities were present in which to apply the doctrine of res judicata to the case **sub judice**.

It is an absolute rule that a judgment or decree rendered on any grounds which do not involve the merits of the action may not be used as the basis for the operation of the doctrine of res judicata. **Allbright v. Hanft**, 333 So. 2d 112 (Fla. 2d DCA 1976). The former adjudication in regards HEMMERLE which the FDIC used in the court below as the basis of res

judicata was based on a breach of contract claim which differs from the claims made by the Appellants, and as such cannot be deemed on the merits. **O'Neal v. Percival**, 25 Fla. 118 , 5 So. 809 (1889).

In **Sunshine Utilities Equipment, Inc. v. Treasure Coast Utilities, Inc.**, 421 So. 2d 1096 (Fla. 4th DCA 1982), in reversing, this Court held that: (1) In identifying the issues previously adjudicated, in order to apply doctrine of res

judicata or estoppel by judgment, the Court may consider only the record of the prior action and that the same principle applies to the doctrine of merger, and (2) the trial court erred by considering extrinsic evidence concerning the prior judgment. It is clear that the record of the prior action was not made part of the action in the court below, nor was the prior issues framed by the FDIC or tendered by the pleadings and put in issue in the case **sub judice**. In **Culloden v. Music**, 226 So. 2d 240, 244 (Fla. 2d DCA 1969) the court reversed holding that the "The test with reference to res adjudicata or estoppel by judgment is, and should be, whether the evidence in both cases is in essence the same albeit under estoppel by judgment, and it must be determined that every point and question' presented in the second action was actually litigated and decided in the first. We hold the view that the expression precise facts' has been, and should be, given the same signification as the words 'every point and question'." In treating the definition of "Res Adjudicata" [1] This Doctrine "is not controlling except in an

instance wherein the second suit is between the "same parties" and is predicated upon the "same cause of action" as was the first." In **Seaboard Coast Line Railroad Co. v. Industrial Contracting Co.**, 260 So. 2d 860 (Fla. 4th DCA 1972), this Court reversed summary judgment holding that to bring the doctrine of res judicata into valid play there must be the four identities previously cited. If these conditions "do not concur", the doctrine of res judicata is "not applicable", citing **Matthews v. Matthews**, 133 So. 2d 91, at p. 94. In **Youndbloud v. Taylor**, 89 So. 2d 503 (Fla. 1956) the Supreme Court held that judgment for defendant in an action brought by father on behalf of his as a next friend, arising out of the same accident for which father brought an action in his own behalf for damages recoverable by his as a result thereof, did not estop father from maintaining subsequent action against defendant on his own account since father, as next friend, was not a real party to the first suit and therefore there was no identity of the parties-plaintiff in the two actions. As in the case **sub judice**, HEMMERLE CONSTRUCTION CO.

has never been a party to any action where the defendant-appellee was a party, and that the claim of lien is that of HEMMERLE CONSTRUCTION CO., notwithstanding that the proceeds have been assigned to SUN-ISLAND for sums of money owed to SUN-ISLAND. Likewise, SUN-ISLAND has never been a party to any action between the FDIC, with the exception of the **FSLIC v. Sun-Island Realty Inc. and Kenneth Hemmerle** Case No. 88-818. Although SUN-ISLAND sought damages in the amount of $1.9 million, the damages sought in that case was based upon a breach of contract and not the foreclosure of a mechanic lien. Thus, the identities required for the purpose of res judicata are missing and as such the doctrine of "res judicata" will not apply.

Next, the FDIC suggested to the court below, that should res judicata not apply, than collateral estoppel should. The lower Court in it's Order of Summary Final Judgment and conclusions of Law found that SUN-ISLAND and HEMMERLE had litigated their claims arising from the assertion that the FSLIC had breached the Agreement by failing to pay for

improvements SUN-ISLAND made to the property, and consequently, they were precluded from maintaining another suit for the same relief pursuant to the principles of res judicata and estoppel by judgment. The lower court concluded that the parties claims in the case **sub judice** and their counterclaims in Case No. 88-818 are ultimately concerned with execution and performance of the agreement.

Since those claims were disposed of in Case No. 88-818, the principles of res judicata and collateral estoppel apply to bar another suit based on the same claims, citing **Wise v. Tucker, supra.** As heretofore pointed out, none of the claims in the case **sub judice** were ever litigated in any other case, and the lower court should have denied the summary judgment and permitted a trier of fact to determine whether or not any of the issues had been tried in any prior action.

Collateral Estoppel, sometimes referred to as Estoppel by Judgment is akin to the doctrine of "res judicata". Collateral Estoppel and Estoppel by Judgment require that

the real parties in interest in both suits be identical and that the issue in the second action that is sought to be estopped from relitigation be identical to, necessary and material issues resolved in the first suit. It is clear that at no time has a mechanic lien foreclosure between the parties to the case **sub judice** and that of any other action been resolved or tried. It is well settled that for a judgment in a prior action operate as an estoppel, it must be only on those matters in issue or the points controverted, on the determination of which the finding was rendered or those right or issues necessarily involved in the conclusion reached. Since no conclusion has ever been reached in regard to the mechanic lien foreclosure, the doctrine of collateral estoppel will not apply to bar the subsequent action for such foreclosure. While the principle of collateral estoppel is applicable where the two causes of action are different, in which case the adjudication is the first suit only estops the parties from litigation in the second suit issues or question common to both causes of action, which were actually adjudicated in the

prior litigation. **Seaboard C.L.R. Co. v. Industrial Contracting Co.**, 260 So. 2d 860 (Fla. 2d DCA 1972); **Seaboard Coast Line R. Co. v. Cox**, 338 So. 2d 190 (Fla. 1976). In **Newport Division, Tenneco Chem., Inc. v. Thompson**, 330 So. 2d 826 (Fla. 1st DCA 1976) the court held that "the mutuality doctrine is but one application in favor of the party who was present at the prior judgment, against one who wasn't-of the well-settled rule that there must be an "identity of persons and the parties to the action" for an estoppel to arise. Citing, **Diagneau v. National Cash Register Co.**, 247 So. 2d 465 (Fla. 4th DCA 1971). In **Krug v. Meros**, 468 So. 2d 299 (Fla. 2d DCA 1985) the court held that where issue is not litigated in prior suit, estoppel by judgment does not arise.

Although, the FDIC'S argument in support of the doctrine of res judicata and collateral estoppel appear to be grounded on the breach of contract suit in Case No. 88-818, it is clear that the issues raised by the complaint in the case **sub judice** was not litigated in that action. In **Allstate Insurance**

Co. v. A.D.H., Inc., 397 So. 2d 928 (Fla. 3d DCA 1981) the court reversed, holding that in an action by a contractor against a carpentry and masonry subcontractors for indemnity, defense or estoppel by judgment was not proven by equivocal jury verdict in prior action by widow of employee killed at job site against contractor. As in this case, the issue was not before the court or jury in Case No. 88-818 in which to make a determination regarding the mechanic lien. Furthermore, the jury verdict in that action awarding SUN-ISLAND $1.9 million dollars has since been reversed by this Court, and as such the FDIC'S original claim as to that verdict being the amount determined by the jury to be the same as the amount claimed in the case **sub judice** now loses all validity attempted by the FDIC to support it's renewed motion for summary judgment.

Even the case cited in support of the FDIC'S motion for summary judgment, **Wise v. Tucker, supra.**, and the lower court's reliance on that case, defeats the motion, and is grounds for reversal. It is clear that the FDIC has never

raised the affirmative defense of res judicata or collateral estoppel, and as such, should have been precluded from arguing its existence in the court below. In headnote 2, **Wise**, Doctrine of estoppel by judgment applies where two suits involve different causes of action and precluded relitigation of those issues which were actually litigated and determined in the prior action and, thus, where two suits were based on common question, estoppel by judgment will prevent defendant from maintaining later one. Headnote 4 **Wise**. It is clear that the issue of mechanic lien foreclosure has never been litigated, and as such, **Wise** should have defeated the renewed motion for summary judgment.

It is well settled that a "contractor" who complies with all provisions of the Mechanics' Lien Law and has substantially performed improvement on real property, is entitled to a mechanics' lien. **Florida Statutes, Section 713.05**.

It is clear, and never been refuted by the FDIC or the FSLIC, that pursuant to the Settlement Agreement entered

into on September 1, 1987, by and between the FSLIC and Acquisition Corp. of America, and by the terms of that agreement, ACA contracted with HEMMERLE CONSTRUCTION CO., pursuant to the demands of the FSLIC for certain improvement on the subject property that formed the subject of the Mechanic Lien. HEMMERLE CONSTRUCTION CO., has not received one cent pursuant to that agreement between the FSLIC and ACA, notwithstanding, that demands have been made for such improvements, and the fee owner, the FSLIC, now the FDIC, is obligated for the performance of labor and materials pursuant to that agreement. It is clear that by the terms of the settlement agreement, and agency relationship existed between the FSLIC and ACA, and as such, the FDIC cannot now argue that it is not obligated for the amount due on the mechanic lien, nor will it use this Court to assist it in such an illegal act.

Accordingly, genuine issues of material fact existed that should have precluded Summary Final Judgment. The standard of review under Fla. R. Civ. P. 1.510 is well settled:

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are functions for the trier of fact, and neither res judicata or collateral estoppel is present to support the Summary Final Judgment. Clearly, res judicata or collateral estoppel will not be applied where, in the prior action, there was not an unquestionable, clear-cut official adjudication. **Universal Constr. Co. v. Fort Lauderdale**, 68 So. 2d 366 (Fla. 1953). Since the Mechanic Lien Foreclosure has never been tried in any other action, and the issues of said lien has never been determined, the FDIC'S renewed motion for summary judgment should have been denied. In **Nationwide Mutual Fire Insurance Co. v. Race**, 508 So. 2d 1276 (Fla. 3d DCA 1987) the Court reversed summary judgment holding that a party claiming defense of collateral estoppel has burden of establishing the issue in question was actually litigated and determined in the prior action. Citing **Mobile Oil Corp. v. Shevin**, 354 So. 2d 372 (Fla. 1977). It was clear that the existence of an issue on a material fact respecting the right to a lien precludes entry

of a summary decree in a suit to foreclose the lien. **First National Bank v. Burnup & Sims of Melbourne, Inc.**, 137 So. 2d 13 (Fla. 2d DCA 1962). The remedy of summary judgment is designed to meet a situation where the salient facts are clearly not in issue, and

where the controversy is purely one of law to be decided upon undisputed facts. Thus, the corollary principle that summary judgment will not be decreed where a genuine issue as to a material fact is presented, as in the case **sub judice**. Genuine issues of fact existed as to the issues relating, inter alia, whether or not the lien foreclosure has been determined in a prior action; issue of fact existed as to whether or not the cause of action is the same as that of Case No. 88-818; issue of fact existed as to whether or not HEMMERLE CONSTRUCTION CO. was a party in Case No. 88-818; issue of fact existed as to whether or not the FDIC met the element requirement necessary to establish the doctrine of res judicata or estoppel by judgment. It should have been clear that the FDIC was not entitled to summary

judgment on the grounds of res judicata or estoppel by judgment.

CONCLUSION

In view of the foregoing, and the case law cited, justice dictates that the Summary Final Judgment be reversed as a matter of law, and that the Plaintiffs-Appellants be permitted their day in court as afforded by the Florida Constitution, Article 1, Section 21.

CERTIFICATE OF SERVICE,

WE HEREBY CERTIFY, that a true and correct copy of the foregoing Initial Brief has been furnished by U. S. Mail this 13th day of March, 1992 to: **SUZANNE H. YOUMANS, ESQ.** 320 Royal Poinciana Plaza, Palm Beach, Florida 33480.

_____
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By_____
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APPENDIX I

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 92-0063

L. T. CASE NO. 88-10252 (AN)

SUN-ISLAND REALTY, INC.,
and KENNETH HEMMERLE,

Appellants,

-VS-

FEDERAL DEPOSIT INSURANCE
CORPORATION, etc.,

Appellees.

BRIEF OF APPELLEE

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PREFACE

Appellee Federal Deposit Insurance Corporation, as

Receiver for Sunrise Savings and Loan Association is designated "FDIC" or "Appellee". Appellant Sun-Island Realty, Inc. is designated "Sun-Island". Kenneth Hemmerle is designated "Hemmerle". Sun-Island and Hemmerle are collectively referred to as Appellants.

Citations to the record appear as R._____. Citations to the appendix appear as A._____.

STATEMENT OF THE FACTS AND OF THE CASE

FDIC disagrees with the statements of the case and of the facts submitted by appellants, which contain several inaccurate and irrelevant "facts", and are unduly argumentative. Accordingly, pursuant to Fla.Rf.App.P. 9.210(c), FDIC submits the following statement.

In 1983, Acquisition Corp. of America ("Acquisition"), a corporation controlled by Hemmerle, executed and delivered to FDIC's predecessor, Sunrise Savings and Loan Association of Florida, a promissory note and a mortgage on certain real property in Palm Beach County, Florida (the "property") (R.1). In December 1986, the Federal Savings and

Loan Insurance Corporation, as Receiver for Sunrise Savings and Loan Association ("FSLIC")[1] sued Acquisition, Hemmerle, Sun-Island and others to foreclose the mortgage and to enforce the terms of the note and certain guaranties executed by Sun-Island and Hemmerle (R.3).

On September 1, 1987, FSLIC, Acquisition, Sun-Island and Hemmerle entered into a written settlement agreement and stipulation (collectively the "settlement agreement") to resolve all outstanding disputes between the parties (R. 3, 14; A.1). The settlement agreement provided, inter alia, for entry of a judgment of foreclosure against Acquisition if FSLIC did not receive payment of $8.2 million on or before December 31, 1987 (A.1-28; Ex. "A"). Additionally, as part of the settlement agreement, Hemmerle and Sun-Island executed and delivered to FSLIC a conditional guaranty of payment, guaranteeing payment of the debt owed FSLIC in the event,

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[1]/ FDIC has succeeded to FSLIC in this action and all other matters herein discussed pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 Pub.L. 101-73, 103 Stat. 183.

inter alia, Acquisition should seek bankruptcy relief (A. 1-28; Ex. "B").

FSLIC did not receive the payment of $8.2 million on or before December 31, 1987. Instead, Hemmerle caused Acquisition to file a Chapter 11 bankruptcy petition on December 30, 1987 (R.5). On December 31, 1987, Hemmerle, d/b/a/ Hemmerle Construction Co., recorded a claim of lien in the amount of $1,886,560 against the property (R.8, 43). On the same day, Hemmerle assigned the claim of lien to Sun-Island (R.7, 44-46).[2]

Pursuant to the settlement agreement, FSLIC obtained a partial summary judgment of foreclosure as to the property (R.5-7; R.369, 427), and took title to the property at public

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[2] The complaint herein was filed by Sun-Island (R.1). Later, Hemmerle twice sought leave to intervene as a party plaintiff (R.297, 344). The trial court deferred ruling on Hemmerle's first motion (R.318-319), and no dispositive order ever was entered on Hemmerle's motions to intervene. However, the summary final judgment from which this appeal is taken provides that "[t]o the extent Hemmerle is considered a party plaintiff to this proceeding, this judgment applies to him as well as Sun-Island." (R.527).

sale in May 1988 (R.8; R.369,431).

In January 1988, as a result of Acquisition's bankruptcy, FSLIC sued Hemmerle and Sun-Island to enforce the terms of the conditional guaranty Hemmerle and Sun-Island executed in connection with the settlement agreement. Fed. Sav. and Loan Ins. Corp. v. Sun-Island Realty, Inc. and Kenneth Hemmerle, Case No. 88-818 in the Circuit Court of Palm Beach County, Florida (R.369-370) (the "guaranty action"). Sun-Island and Hemmerle answered FSLIC's complaint and asserted numerous affirmative defenses and counterclaims arising from FSLIC's alleged fraudulent inducement and breach of the settlement agreement (R.432-449; A.2, pp. 1-18).[3] In its breach of contract claim, Sun-

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[3] The essence of appellants' claims was their contention that FSLIC fraudulently induced their execution of the settlement agreement by verbally agreeing to extend the written payment deadline contained in the agreement, that FSLIC breached its alleged verbal agreement to extend the payment deadline, and that FSLIC committed various other breaches of the settlement agreement (R.432-449; A.2, 3, 4). See generally, Fed. Deposit Ins. Corp. v. Hemmerle, 592 So.2d 1110, 1112 (Fla. 4th DCA 1991); see also, Acquisition Corp. of America, et al v.

Island sought damages exceeding $1.9 million based on improvements it allegedly made to the property (R.370,445; A.3, p.11). Hemmerle asserted an identical claim for breach of the settlement agreement (A.2, p.15), and sought damages for the construction costs he allegedly incurred in connection with the improvements (A.2, p. 15; A.3, pp. 27-28).

Following trial on appellants' counterclaims in the guaranty action, judgment was entered on jury verdicts in favor of Sun-Island and Hemmerle, awarding Sun-Island $1.9 million and Hemmerle $25 million (R.448-449). FDIC appealed and this Court reversed, instructing the trial court to enter directed verdicts in favor of FDIC on appellants' counterclaims. Fed. Deposit Ins. Corp. v. Hemmerle, 592 So.2d 1110, 1112 (Fla. 4th DCA 1991).

In December 1988, Sun-Island commenced this action against FSLIC, seeking foreclosure of its claim of lien, asserting that it advanced funds exceeding $1.9 million for

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Fed. Deposit Ins. Corp., 760 F.Supp. 1558, 1560-1562 (S.D. Fla. 1991).

improvements to the property pursuant to the settlement agreement (R.1, 708). Sun-Island also asserted claims for breach of contract, fraud in the inducement, quantum meruit, and assumption (R.9-13). All of Sun-Island's claims were predicated on allegations that FSLIC fraudulently induced its execution of the settlement agreement and breached the settlement agreement (R.1-13).

FDIC moved for summary judgment on the grounds that appellants' claims were barred pursuant to the doctrines of res judicata and collateral estoppel by virtue of the judgment entered in the guaranty case (R. 367-372). The trial court granted FDIC's motion for summary judgment (R.524-528). Appellants moved for rehearing and/or reconsideration, which motion was denied by Order dated December 17, 1991 (R.540-541). Appellants appeal both orders (R.542).

SUMMARY OF THE ARGUMENT

There is no genuine issue regarding the fact that appellants litigated the claims and issues raised in the case sub judice in the guaranty action. Consequently, the trial

court properly determined, as a matter of law, that appellants' claims were barred by the doctrines of estoppel by judgment and res judicata. The issues in the guaranty action and the issues in this case both concern alleged breaches of the settlement agreement, and were disposed of in the guaranty action. Thus, estoppel by judgment precludes appellants from litigating the same issues again in this proceeding. Similarly, the judgment entered in the guaranty action was a judgment on the merits as to the claims asserted herein,a nd therefore concludes all issues which were raised or which could have been raised in the guaranty action.

In this action, appellants seek compensation for approximately $2 million of improvements they purportedly made to the property pursuant to the settlement agreement. However, the settlement agreement explicitly required Acquisition to construct $2 million of improvements to the property at its sole cost and expense. Thus, FDIC is entitled to judgment, as a matter of law, pursuant to the express rovisions of the settlement agreement.

ARGUMENT

I. Appellants' Claims are Barred by the Doctrines of Estoppel by Judgment and Res Judicata as a Matter of Law.

As established above, there is no genuine issue as to any fact material to these proceedings. Significantly, as it does here, in the trial court FDIC relied solely on facts alleged in appellants' pleadings to establish the basis for summary judgment. Based on appellants' own allegations, which were necessarily deemed true, the trial court properly ruled as a matter of law that appellants' claims were barred by the doctrines of estoppel by judgment and res judicata.

A. Estoppel by Judgment

This is not the first or even the second time this Court has had the opportunity to visit the claims appellants assert herein. This Court is now reviewing for the third time the very same arguments appellants made in the cases styled Fed. Deposit Ins. Corp. v. Hemmerle and Sun-Island Realty, Inc., 592 So.2d 1110 (Fla. 4th DCA 1991), and Hemmerle v. Fed.

Deposit Ins. Corp., 556 So.2d 457 (Fla. 4th DCA 1990).[4]

Because appellants' claims herein were litigated in the guaranty action, they are barred pursuant to the doctrine of estoppel by judgment as a matter of law.

> [Estoppel by judgment] applies where two suits involve different causes of action . . . (and) precludes relitigation of those issues which were actually litigated and determined in the prior action . . . where two suits are based on a common question, estoppel by judgment will prevent a defendant from maintaining the later one.

Wise v. Tucker, 399 So.2d 500, 502 (Fla. 4th DCA 1981) (citations omitted) (cited with approval in Fed. Deposit Ins. Corp. v. Hemmerle, 592 So. 2d at 1117).

Since the issues in the guaranty action and this case ultimately concern execution and performance of the settlement, and since such claims were disposed of in the

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[4] Indeed, this is actually Hemmerle's fourth bite at this apple, and Sun-Island's third bite. See, Acquisition Corp. of America, Sun-Island Realty, Inc. and Kenneth Hemmerle v. Fed. Deposit Insurance Corp., 760 F.Supp. 1558 (S.D. Fla. 1991) (A.4). In each of the cited cases, Sun-Island and/or Hemmerle unsuccessfully argued that they were fraudulently induced to execute the settlement agreement and that FSLIC breached the settlement agreement.

guaranty action,[5] estoppel by judgment precludes appellants[6] from relitigating the same issues in this case. Wise; Hemmerle.

Sun-Island's own pleadings provide the best evidence that the issues in both cases are identical. In the guaranty action, Sun-Island alleged (i) that pursuant to the settlement agreement, it "agreed to continue construction on the mortgaged property to the extent that said property would be improved in the amount of $2 million", (ii) that it was

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[5] Appellants' argument that the causes of action herein differ from those asserted in the guaranty action is immaterial. Estoppel by judgment applies "whether the causes of action in the two suits be identical or different." McGregor v. Provident Tr. Co., 162 So.323, 327 (Fla. 1935).

[6] Appellants argue that Hemmerle, d/b/a Hemmerle Construction Co., (a) has never been a party to any litigation with FDIC or its predecessors and (b) is, therefore, not bound by earlier judgments (Initial Brief, p.13, 18). As this Court held in Fed Deposit Ins. Corp. v. Hemmerle, 592 So.2d at 1117, "a ruling adverse to a controlling person of a corporation precludes the corporation from litigating that claim in a subsequent action." This rationale certainly applies to a sole proprietorship such as Hemmerle, d/b/a Hemmerle Construction Co.

damaged because "Sun-Island and others have paid out to improve the mortgaged property an amount in excess of $1.9 million", and (iii) Sun-Island requested damages "in an amount exceeding $1.9 million" (R.445). In this case, Sun-Island alleged (i) that pursuant to the settlement agreement it advanced $1,886,560 for improvements to the property (R.5), (ii) that it was owed $1,886,560 for work performed subsequent to and pursuant to the settlement agreement (R.5,7-8,9,10,12), and (iii) it requested "damages in an amount exceeding $1,886,560" for work performed pursuant to the settlement agreement and as a result of FSLIC's alleged fraudulent inducement thereof (R.8,10,11,12).

Appellants' pleadings in the guaranty action and the instant case unequivocally establish that the ultimate factual and legal issues for determination in both cases are identical: matters surrounding execution, performance and/or breach of the settlement agreement. Consequently, appellants are precluded from relitigating those issues in this case. New River Yachting Center v. Bacchiocchi, 407 So.2d 607, 609

(Fla. 4th DCA 1981) review denied, 415 So.2d 1360 (Fla. 1982) ("Once a party has had an opportunity to litigate a matter in a court of competent jurisdiction, he should not be permitted to litigate it again to the harassment and vexation of his opponent.")

Appellants' argument that they have never litigated the claims raised in this case is absurd. Appellants have litigated these claims over and over again to the harassment and vexation of FDIC. E.g., Fed. Deposit Ins. Corp. v. Hemmerle, 592 So.2d 1110 (Fla. 4th DCA 1991); Hemmerle v. Fed. Deposit Ins. Corp., 556 So.2d 457 (Fla. 4th DCA 1990); Acquisition Corp. of America, Sun-Island Realty, Inc. and Kenneth Hemmerle v. Fed. Deposit Ins. Corp., 760 F.Supp. 558 (S.D. Fla. 1991).

B. Res Judicata

Appellants' claims are likewise barred as a matter of law pursuant to the doctrine of res judicata. It is well established that "[u]nder the doctrine of res judicata, a final judgment or decree on the merits, by a court of competent

jurisdiction, constitutes an absolute bar to a subsequent suit on the same cause of action, and concludes all issues which were raised or could have been raised in the action." Wise v. Tucker, 399 So.2d 500, 502 (Fla. 4th DCA 1981) (citations omitted).

In their brief, appellants argue that the guaranty action was not decided on the merits (Initial Brief at pp.15-16). This could not be further from the truth. Appellants' claims were submitted to a jury, judgment was entered on the verdicts, and plenary review in this Court followed. Fed. Deposit Ins. Corp. v. Hemmerle, 592 So.2d 1110 (Fla. 4th DCA 1991).[7]

Appellants erroneously maintain that since they did not assert a mechanic's lien claim in the guaranty action, that decision is not res judicata as to their mechanic's lien claim. The decision in the guaranty action is res judicata as to all claims raised or which could have been raised therein. Wise v. Tucker, 399 So.2d at 502. Appellants' unsupported

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[7] That this Court reversed the judgment in favor of appellants does not change the fact that appellants' claims were fully and finally litigated on the merits.

conclusion that the mechanic's lien claim could not be brought in the guaranty action (see pp. 13-14 of Initial Brief) is specious. Obviously, the mechanic's lien claim is based on the settlement agreement which was the subject of the guaranty action and thus was a proper counterclaim therein. See, Fla.R.Civ.P. 1.170. Moreover, the record in the guaranty action (of which this Court can take judicial notice, e.g., Lagarde v. Outdoor Resorts of America, Inc., 428 So.2d 669 (Fla. 2d DCA 1982) establishes that appellants never attempted to assert the mechanic's lien claim, despite the pendency of the guaranty action at the time of commencement of the case sub judice.

Since Sun-Island and Hemmerle fully litigated their claims against FDIC in the guaranty action, res judicata bars their assertion of those same claims and concludes all issues which were raised or which could have been raised with respect to fraudulent inducement and breach of the settlement agreement. Wise v. Tucker, 399 So.2d at 502; see also, Fed. Deposit Ins. Corp. v. Hemmerle, 592 So.2d 1110,

1115 ("the doctrine of res judicata barred [appellants'] affirmative defenses and counterclaims [fraudulent inducement and breach of the settlement agreement] as a matter of law").

Appellants have failed to identify either (i) a single distinction between their earlier claims in the guaranty action and the claims raised herein or (ii) any genuine issue of fact regarding the resolution on the merits of their claims. Consequently, the trial court properly determined as a matter of law that appellants' claims in this action were barred pursuant to the doctrines of estoppel by judgment and res judicata.

II. FDIC is Entitled To Judgment as a Matter of Law Pursuant to the Settlement Agreement

The settlement agreement explicitly obligated Acquisition to construct at least $2 million of improvements to the property at "its sole cost and expense" (A.1, pp. 12-13). Obviously, any claim arising from such improvements lies against Acquisition, not FDIC. Consequently, FDIC is entitled

to judgment as a matter of law on this basis alone.

Although this issue was not addressed by the trial court, this Court has recognized that "even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it." Parker v. Gordon, 442 So.2d 273, 273 (Fla. 4th DCA 1983).

CONCLUSION

For the foregoing reasons, appellee respectfully requests that this Court affirm the judgment of the trial court in all respects.

Respectfully submitted,

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Palm Beach, Florida 33480
(407) 832-6000
By: _____
Suzanne H. Youmans

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed this _____ day of April, 1992, to Kenneth Hemmerle, 808 Northeast Third Avenue, Fort Lauderdale, Florida 33304; and Richard

Doggett, Esquire, 808 Northeast Third Avenue, Fort Lauderdale, Florida 33304

Suzanne H. Youmans

APPENDIX J

IN THE DISTRICT COURT OF APPEAL
FOR THE FOURTH DISTRICT OF FLORIDA

CASE NO. 92-0063

L. T. CASE NO. 88-10252 (AN)

SUN-ISLAND REALTY, INC.,
and KENNETH HEMMERLE,

Appellants,

-VS-

FEDERAL DEPOSIT INSURANCE
CORPORATION, etc.,

Appellee.
/

REPLY BRIEF OF APPELLANTS

On Appeal from the Seventeenth Judicial Circuit Court
in and for Broward County, Florida

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PREFACE

Appellants' SUN-ISLAND REALTY, INC., and KENNETH HEMMERLE will be designated as Appellants.

Appellee will be designated as Appellee.

All emphases appearing will be that of the author unless otherwise noted.

STATEMENT OF THE FACTS AND OF THE CASE

Appellants vehemently disagrees with several assertions made in Appellee's Statement of the Facts and of the Case. The Appellee alleges that in 1983, Acquisition Corp. of America ("Acquisition"), **a corporation controlled by** Hemmerle, **executed and delivered to** FDIC'S **predecessor,**

Sunrise Savings and Loan Association of Florida, a promissory note and mortgage on certain real property in Palm Beach County, Florida (the "property"). To correct this assertion, it is clear that Hemmerle never controlled Acquisition.

Next, Appellee contends that Hemmerle caused Acquisition to file a Chapter 11 bankruptcy petition on December 30, 1987. Again,a misrepresentation by the Appellee.

Appellee's Claim that Appellants' claims were predicated on allegations that the FSLIC fraudulently induced execution of the settlement agreement is another untrue statement. It is clear that the FSLIC did in fact fraudulently induce the execution of the settlement agreement, but it is not true that the claims for lien foreclosure is predicated on such allegations.

Appellee states that it moved for Summary Judgment on the grounds that Appellants' claims were barred pursuant to the doctrines of res judicata and collateral estoppel by virtue of

the judgment entered on the guaranty case. Appellee fails to show that it previously moved for summary judgment which was denied, and that no new proof were presented on its second motion for summary judgment. Appellee fails to inform the Court that the doctrines of res judicata and collateral estoppel were available at the time of its first motion for summary judgment since the hearing on this motion was well after the final judgment in Case No. 88-818 (AA).

Appellants do not dispute the remainder of Appellee's Statement of the Facts and of the Case.

RESPONSE TO SUMMARY OF THE ARGUMENT

Appellee claims that there is no genuine issue regarding the fact that Appellants litigated the claims and issues raised in the case sub judice in the guaranty action. It appears that this argument is nothing more than a far reaching attempt to avoid the real issues sought to be reviewed by this Court. It is clear that the judgment entered in the guaranty action was not a judgment on the claims asserted in this action. Simply because the amount of

compensation in both action appear to be similar amounts, the cause of action is not similar.

A Lien foreclosure action differs in every respect to that of a guaranty action or a breach of contract action. Clearly a lien may be had for the performance of labor or services constituting an improvement or part of an improvement done on land or other real property for its permanent benefit. The action for guaranty and breach of contract in no way relates to the action for mechanic lien foreclosure. And even if the such claims did relate, it is clear that Hemmerle Construction Co., the contractor for the improvements, was never a part of any other action between the Appellee in this cause in which to support the doctrines of res judicata or estoppel by judgment.

RESPONSE TO ARGUMENT

I. Are Appellants' Claims Barred by the Doctrines of Estoppel by Judgment and Res Judicata as a Matter of Law.

Appellants suggest that their claims are not barred by the doctrines of estoppel by judgment or res judicata for the

following reasons. It is clear that a genuine issue of material fact existed as to whether or not the doctrines above mentioned applied to the mechanic lien foreclosure action.

A. Estoppel by Judgment

It appears that the crux of Appellee's argument in support of Estoppel by Judgment as set fort in it's argument appears on page 6, and states that this is not the first or even the second time this Court has had the opportunity to visit the claims appellants assert herein. In support of this allegations, Appellee cites prior appeals made to this Court between the same parties. However, a review of the prior appeals will clearly show that none of such appeals even touched on a claim of Mechanic Lien Foreclosure. What Appellee is suggesting, is that since some of the parties to this action has had appeals before this Court, they are estopped from further appeals. Appellee suggest that this Court rule that Article 1, Section 22 (Access to the Courts) of Florida Constitution should not be afforded to the Appellant, and that the Appellee should have special privileges in this Court in

which to prevent any type of redress by Appellants.

Appellee argues that Appellants' claims herein were litigated in the guaranty action, and that they are barred pursuant to the doctrine of estoppel by judgment as a matter of law. In support of this contention, Appellee cites Wise v. Tucker, 399 So. 2d 500, 502 (Fla. 4th DCA 1981). A review of the Tucker case will clearly show that it does not apply to this case. This court held in Nail v. Rinker Materials Corp., 528 So. 2d 450, review denied 537 So 2d 569 (Fla. 4th DCA 1988) that judgment for the employer in a malicious prosecution action did not bar false arrest and false imprisonment action on res judicata or collateral estoppel grounds; issues were not the same, even though essential facts alleged in both action were the same. By this holding, it is clear that the issues in the lien foreclosure action were not the same as the guaranty or breach of contract action, and as such, Wise v. Tucker cannot apply to support a summary judgment where the issues are different.

B. Res Judicata

It is clear that there has never been adjudication of the Mechanic Lien foreclosure in any action whatsoever, and is supported by this Court's holding in Hittel v. Rosenhagen 492 So. 2d 1086 (Fla. 4th DCA 1986). In Pipkin v. Wiggins 526 So. 2d 1002 (Fla. 3d DCA 1988) the Court stated that Collateral Estoppel did not bar relitigation of a jurisdictional issue where jurisdiction in a later action was based on acts of solicitation within the state which were not present or pertinent in the previous jurisdictional determination. Although jurisdictional determination is not before this Court, the findings in Pipkin applies to that case sub judice, since the lien foreclosure was

never present in any other action. In Krug v. Meros 468 So. 2d 299 (Fla. 2d DCA 1985) it was held that the doctrine of estoppel by judgment does not apply when unanticipated subsequent events create a new legal situation.

Under Florida Statutes, Section 713.30 provides that the Mechanics' Lien Law is cumulative to other existing remedies. In Quality Industries, Inc. v. Keys it was held that tendency of

an action to enforce a contractor's lien against property did not preclude the contractor's independent contract action against the property owners to recover the outstanding balance on the contract to improve property. As in the case at bar, the contract was between Acquisition and Hemmerle Construction Co. for certain improvements required and demanded by the FSLIC in the settlement agreement which Hemmerle Construction Co. was not a part of. For the FSLIC or its

successor in interest to now disclaim any obligation for payment on property owned by them for the improvement made by the contractor, is in direct violation of the statutory mechanic lien law, and such violation would effectively permit an act of larceny of the part of the Appellee.

Since it is clear that neither Sun-Island **or** Hemmerle Construction Co. ever litigated their claims for mechanic lien foreclosure, neither res judicata or estoppel by judgment would apply. Consequently, the lower court erred in granting summary judgment on the basis of the doctrines of estoppel

by judgment and res judicata.

II. The FDIC is not Entitled to Judgment as a Matter of Law Pursuant to the Settlement Agreement.

Although Appellee's statement that the settlement agreement explicitly obligated Acquisition to construct at least $2 million of improvement to the property at "its sole cost and expense", it is not true that any claim arising from such improvements lies against Acquisition and not the FDIC.

It is clear that the owners of the property upon which the Mechanic Lien attached, are the parties obligated for the payment of such improvements. See 1987 amendments to the Mechanics' Lien statute. 62 Fla. BJ #3 21. Section 713(3), Florida Statutes, provides that persons who are in privity with an owner and who perform labor or services or furnish materials constituting an improvement or part thereof shall have rights to a lien on real property as provided in Section 713.05. In Rutenberg-Sarasota, Ltd. v Eisner, 509 So. 2d 398 (Fla. 2d DCA 1987) the court held that subcontractor's employees, whose employment agreement was a properly

authorized contract with subcontractor and whose agreement was based upon subcontractor's direct contract with owner and developer for improvement of real property, had standing to utilize mechanics' lien law. It is clear by Appellee's own admission, that the settlement agreement explicitly obligated Acquisition to construct at least $2 million of improvements to the property, and is it further clear that the than owned real property by Acquisition is now owned by the FDIC pursuant to that settlement agreement, and as such Acquisition's obligation for the improvement to the property in now the obligation of the FDIC as the contracting party to the settlement agreement given rise for improvements made. The FSLIC was in fact the demanding party for such improvements which caused the mechanic lien. Appellee's argument that any claim arising from such improvement lies against Acquisition and not the FDIC, is without merit, and contrary to the Mechanic Lien Law.

CONCLUSION

Genuine issues of Material Fact are present which precludes

Summary Judgment. The doctrines of Estoppel by Judgment and Res Judicata do not apply to the case sub judice, as such, it is respectfully requested that this Court reverse the Summary Final Judgment as justice dictates.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Reply brief has been furnished by U. S. Mail this 14th day of May, 1992 to: **SUZANNE H. YOUMANS, ESQ.**, 320 Royal

Poinciana Plaza, Palm Beach, Florida 33480.

_____

KENNETH HEMMERLE

APPENDIX K

IN THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT OF FLORIDA
SUN-ISLAND REALTY, INC., and KENNETH HEMMERLE,

Appellants,

-VS- CASE NO. 92-0063

FEDERAL DEPOSIT INSURANCE CORPORATION, etc.,

Appellee.

MOTION FOR REHEARING

Appellant, KENNETH HEMMERLE, (hereinafter "HEMMERLE") pursuant to Florida Rules of Appellate Procedure, Rule 9.330(a), moves this Court for Rehearing of this Court's Opinion filed on September 30, 1992, and in support here of would show the following:

This Court is not conferred with the inherent power to disregard the statutory authority set forth in Chapter 713 Florida Statutes. Section 713.30 Florida Statutes provides in pertinent part that: Other actions not barred. --This part I shall be cumulative to other existing remedies and nothing contained in part I of this chapter shall be construed to

prevent any lienor or assignee under any contract from maintaining an action thereon at law in like manner as if he had no lien for the security of his debt, and the bringing of such action shall not prejudice his rights under part I of this chapter, except as herein otherwise expressly provided.

APPENDIX

This Court's opinion expressly states that: "This is Mr. Hemmerle's fourth attempt to prevail on issues litigated and decided in FDIC's favor." Citing Federal Deposit Ins. Corp. v. Hemmerle and Sun-Island Realty, Inc., 592 So. 2d 1110 (Fla. 4th DCA 1991); Acquisition Corp. of America, Sun-Island Realty, Inc. and Kenneth Hemmerle v. Federal Deposit Ins. Corp., 760 F. Supp. 1558 (S.D. Fla. 1991). Further, this Court stated that: "We decline to give Mr. Hemmerle yet a fourth bite of the apple." "Once a party has had an opportunity to litigate a matter in an action in a court of competent jurisdiction, he should not be permitted to litigate it again to the harassment and vexation of his opponent." New River Yachting Center, Inc. v. Bacchiocchi, 407 so. 2d 607 (Fla. 4th

DCA 1981), rew. denied 415 So. 2d 1360 (Fla. 1982).

In response, it is clear that the Court overlooked the fact that HEMMERLE has yet to have the first bite at the apple. The only time HEMMERLE has had a day in court, was on the breach of contract claim, regarding the settlement agreement. It has no play to the Mechanic Lien Action, and in the trial court on that breach of contract claim, the jury found for HEMMERLE, after which this Court reversed that finding.

Next, this Court was in error in finding that HEMMERLE controlled Acquisition Corp. of America (ACA) and Sun-Island Realty at all times material to the aforementioned actions. Well prior to the settlement agreement, all interest of HEMMERLE'S in Acquisition Corp. of America had been sold to the Boston Pointe Corporation, a Massachusetts corporation, of which HEMMERLE had or has an interest. By virtue of an appeal in this Court, resulting in a dismissal on procedural grounds, the Court is and was fully aware that HEMMERLE had no interest in ACA. This

Court's opinion on the unfounded conclusion that HEMMERLE was an Officer and on the Board of Directors, but owned no stock in Sun-Island Realty, and as such could not control Sun-Island Realty, Inc. Sun-Island Realty, Inc. was always controlled by its shareholders.

HEMMERLE insists that this Court has overlooked and failed to apply its own decision in the case of Sunshine Utilities Equipment, Inv. v. Treasure Coast Utilities, Inc., 421 So. 2d 1096 (Fla. 4th DCA 1982). In reversing, this Court held that: (1) In identifying the issues previously adjudicated, in order to apply doctrine of res judicata or estoppel by judgment the Court may consider only the record of the prior action and that the same principle applies to the doctrine of merger, and (2) the trial court erred by considering extrinsic evidence concerning the prior judgment. Notwithstanding that the record of the prior action was not made part of the action in the court below, nor were the prior issues framed by the FDIC or tendered by the pleadings. It appears that this court's opinion is based upon estoppel by judgment by it's

cite in McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 2d 323, 327 (Fla. 1935). A review of that case clearly shows it neither has or had any application to the issues in this appeal. Next, the Court in it's opinion cites Krug v. Meros, 468 So. 2d 299 (Fla. 2d DCA), rev. denied, 480 So. 2d 1295 (Fla. 1985) for the proposition that the causes of action in the two suits must be different and the real parties in interest must be identical to both suits. HEMMERLE fully agrees.

However, in Krug v. Meros, supra, it was held that the doctrine of estoppel by judgment does not apply when unanticipated subsequent events create a new legal situation. As in this case, the demand of the Appellee and or its agent that additional $2,000,000 be added to the project created a new legal situation. Again this Court's conclusion regarding HEMMERLE'S interest in Acquisition Corp. is misplaced, as heretofore stated, as HEMMERLE'S interest had been sold well prior to the settlement agreement referred to in 1 on page three of this Court's opinion. It is clear that a lien, mechanic or mortgage, follows the property. Appellee's

predecessor demanded the improvements, Acquisition Corp. contracted with Hemmerle Construction Co. to make the improvements demanded by the Appellee's predecessor. HEMMERLE made the improvements which neither Acquisition Corp. or the FSLIC paid HEMMERLE for such improvements that wasubsequently owned by the FSLIC.

The Court overlooked the fact that HEMMERLE CONSTRUCTION CO. was never a party to the settlement agreement, and was but an innocent General Contractor, contracted by the FSLIC and Acquisition Corp. to make $2,000,000 in improvement to the subject property. To now say that after $1,886,560 in improvements made to the subject property, HEMMERLE CONSTRUCTION CO. is not entitled to compensation for the improvenents is contrary to Section 713.30 Florida Statues.

HEMMERLE insists that this Court has overlooked and failed to apply the Decision of the Supreme Court in Mobile Oil Corp. v. Shevin, 354 So. 2d 372 (Fla. 1977). The Supreme Court's holding in Shevin supra was that the

essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. All of the elements must be present. It appears that none of the elements required to support collateral estoppel are present, since the mechanic lien action was never litigated or determined and the parties are different.

HEMMERLE insists that this Court has overlooked and failed to apply its own decision in the case of Ward v. Zeidwig, 521 So. 2d 215, 219 (Fla. 4th DCA 1988) holding that the Supreme Court's statement that mutuality of parties remains a prerequisite to application of the doctrine of collateral estoppel.

HEMMERLE insists that this Court has overlooked and failed to apply the decision in Nationwide Mutual Fire Insurance Co. v. Race, 508 So. 2d 1276, 1280 (Fla. 3d DCA 1987) holding that a party claiming defense of collateral estoppel has burden of establishing that issue in question

was actually litigated and determined in the prior action.

It is clear that neither res judicata or collateral estoppel would apply pursuant to cause law originating from this court, other district court and the SUPREME COURT OF FLORIDA, and both res judicata and collateral estoppel have been settled by judicial decision and should in the main be adhered to. This rule is especially applied where a decision construing a statute affects the validity of a certain mode of transacting business of passing title to property, and a change of decision will necessarily confuse or invalidate transaction entered into and acted upon in reliance of the law as judicially construed. "Stare Decisis", literally translated, is the mandate to let that which has been decided stand undisturbed. In this case, it would appear that "stare decisis" did not apply where the opinion was and is in direct conflict with this court's opinion as well as opinions of the Supreme Court and other District Courts of Appeal.

This Court should not hesitate to declare the law as it finds it, and the court should not by judicial fiat make

changes in established law that will injuriously affect the Appellant in this cause, even though the court is bias has a dislike of HEMMERLE as shown by the language in the opinion. It is undisputed that the doctrine of stare decisis applies with peculiar force and strictness to judicial decisions which have determined questions respecting property, trade, and vested rights. In the construction of statutes, such as Chapter 713, Florida Statues, the rule is invavariably to adhere to the doctrine of stare decisis. Langley v. New Deal Cab Co. 138 So. 2d 789 (Fla. 1st DCA 1962). Even the Supreme Court will not overrule one of its prior decisions construing a statute where the legislature has held several sessions since such decisions without modifying or amending the Statute. A decision construing a statute becomes almost a rule of property, and should be followed by the courts, leaving any possible change therein to legislative action.

In Continental Assur. Co. v. Carroll, 485 So. 2d 406 (Fla. 1986) it was held that no District Court can legitimately

circumvent a decision of the Sopreme Court, the proper course is to rule in accordance with the Supreme Court precedent and then certify the question to the Supreme Court. In this case, the doctrine of res judicata and collateral estoppel cannot give rise to a summary judgment absence the elements in which to support such doctrines as mandated by the Supreme Court. It is clear the elements are absent, and as such this Court should have reversed the trial court's summary judgment.

Florida Supreme Court's decisions must be applied to amy pending appeal; the appeal is secided upon the law as it stands at the time of the decision in the appeal.

In Hethcoat v. Chevron Oil Co., 380 So. 2d 1035 (Fla. 1980), on remand (Fla. 1st DCA) 383 So. 2d 931, holding that a District Court decision on review by certiorari would be quashed and remanded with regard to that part of the decision which conflicted with a subsequent Supreme Court decision in another case.

I KENNETH V. HEMMERLE as one of the appellants

in this appeal, do certify, that upon careful examination of the opion of this Court, do verily state that there has never been a prior attempt to prevail on any issue ever litigated and decided in the FDIC'S favor. I further aver that the case in the Court below, preceded the cases mentioned in this Court's opinion as is shown by the Lower Court's Case No. 88-10252, dated 1988. The conclusion of this Court as to the ownership or control of either Sun-Island Realty, Inc. or Acquisition Corp. of America is in error, as can be shown by the records of the Secretary of State,and verified by the real parties in interest. The claims set forth in the Mechanic Lien Foreclosure action in no way relate or are in common with the guaranty litigation other than the work performed was on the insistence of the Appellee's predecessor, and as such, can be established by the clear reading of the settlement agreement which is an exhibit to this appeal. I further verily believe that the facts stated and the facts quoted, as well as the controlling case law,in this Motion for Rehearing have been overlooked by this Court and that these facts are

material and should preclude summary judgment. I also verily believe that the Court has overlooked and failed to apply its prior decisions and the decisions of other District Court as well as decisions of the Supreme Court of Florida, as fully set out in this motion, all of which are controlling and would require a different ipinion from that rendered September 30, 1992, that has erroneously misapplied controlling authorities and has drawn incorrect conclusions contrary to the positive evidence as submitted to the Court below.

WHEREFORE, it is requested that a Rehearing should be had and the opinion revised as to both law and fact, and in compliance with controlling case and statutory provisions in regards to Mechanic Lien Law, believing that a re-examination of the record make by the trial court as well result in a revision and reversal of the Summary Judgment upon the gunuine issues of material fact, and that a miscarriage of justice will occur if the Summary Judgment entered by the Court below is not reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U>S> Mail to SUSANNE H. YOUMANS, ESQ., 320 Royal Poinciano Plaza, Palm Beach, Florida 33480 this 5th day of October, 1992.

_____

Kenneth V. Hemmerle

808 N.E. Third Avenue

Fort Lauderdale, FL 33304

305-467-6801

APPENDIX L

IN THE DISTRICT COURT OF APPEAL FOR THE FOURTH DISTRICT OF FLORIDA
SUN-ISLAND REALTY, INC., and KENNETH HEMMERLE,

Appellants,

-VS- CASE NO. 92-0063

FEDERAL DEPOSIT INSURANCE CORPORATION, etc.,

Appellee.

MOTION FOR REHEARING

Appellant, SUN-ISLAND REALTY, INC., (hereinafter "SIR") pursuant to Florida Rules of Appellate Procedure, Rule 9, 330(a), moves this Court for Rehearing of this court's Opinion filed on September 30, 1992, and in support hereof, would show the following:

From the Court's opinion, this Appellant has determined that the affirmance was based upon the doctrines of res judicata and estoppel by judgment.

The records referred to in the case mentioned in the opinion clearly fail to show that a judgment exists against Sun-Island Realty, Inc. In the settlement agreement which

gave rise to the judgment against Acquisition Corp. of America and Hemmerle, it has been clearly determined by the Court below in those cases, that Sun-Island Realty, Inc. never consented to a waiver of its claims or defenses. The only trial between Sun-Island Realty, Inc. and The Federal Savings and Loan Insurance Corporation (FSLIC), the predecessor of the FDIC, and that Sun-Island Realty, Inc., prevailed in that action which was later reversed by this court.

It appears that this Court overlooked the material fact that in the Court below, on two different occasions, the motion of summary judgment was denied.

In addressing the issue of res judicata, the Court overlooked the it's own finding in Seaboard C.L.R.Co. v. Industrial Contracting co., 260 So. 2d 860 (Fla. 4th DCA 1972) holding that to make a matter res judicata, there must be a concurrence of the following conditions: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the person for or against

whom the claim is made, also, Scriner v. Dyer 462 So. 2d 1122 (Fla. 4th DCA 1984. It is clear that condition (1) has not been met by the Appellee, in the identity in the thing sued for is not present. The thing sued for in the actions mentioned in the opinion was a breach of contract, the thing sued for in this action is a lien foreclosure. Condition (2) has not been met by the Appellee, in that the identity of the cause of action is differrent. Condition (3) has not been met, and condition (4) has not been met as shown by the absence of conditions 1, 2, and 3. The doctrine of res judicata will not apply to a case if any of the four conditions are not met by the moving party.

Next, the opinion supports an affirmance on the basis of estoppel by judgment. Again, the necessary elements in which to support the doctrine of estoppel by judgment have not been shown in the Court below, nor are the elements present to support this Court's opinion. Although the Court's opinion refers to Krug v. Meros, 468 So. 2d 190 (Fla. 1976) to support it's opinion regarding estoppel by judgment, it

appears that the Court overlooked the final analysis in Krug supra which stated that:

"We begin our analysis by an examination of the doctrine of estoppel by judgment. It is well settled that in order to apply this doctrine, the causes of action in the two suits must jbe different and the real parties in interest must be identical to both suits."

"In identifying the issues previously adjudicated, the court may consider only the record of the prior action."

"In any event, Meros, as the party claiming the defense of estoppel by judgment, has the burden of sufficiently establishing in the record that the issue of fraud was actually litigated and determined with sufficient certainty in the prior action so as to mandate the trial court's acceptance and application of the estoppel by judgment defense."

"Finally, we note that the doctrine of estoppel by judgment does not apply where unanticipated subsequent events create a new legal situation."

In Seaboard Coast Line Railroad Co. v. Cox, 338 So. 2d 190

(Fla. 1976) this Court's opinion which stated that the claims at bar have in common with the guaranty litigation the issues of execution and performance of the settlement agreement is is fact misplaced. There has never been any litigation regarding the continued construction of the subject property. The continued construction demanded by the FSLIC was for the sole purpose that in the event the property was turned over the FSLIC, such turnover would not affect the sales that had been made prior to the settlement agreement and would not affect continued and additional sales. As such, the guaranty action was not dispositive of any issue regarding a lien foreclosure. In Seaboard supra the Court held that estoppel by judgment requires that real parties in interest in both suits be identical and that issue in second action that is sought to be estopped from relitigation be identical to necessary and material issues resolved in first suit. It is clear that the issues of the lien foreclosure was not a part of the guaranty action, in that the parties were different. If the Appellee would have sought to have the lien foreclosure

action disposed of in the guaranty action they should have had the cases consolidated. The claims against Sun-island Realty in the guaranty action still remains pending in the trial court. The trial court recognized that Sun-Island Reality did not waive its claims or defenses in the guaranty action by the stipulation, and as such could not enter a stipulated judgment as was entered against Acquisition Corp. of America and Kenneth Hemmerle. This Court's decision that the Settlement agreement obligated ACA to complete approximately $2 million of improvements to the subject property at ACA's sole cost and expense. Any claim arising from such improvements lies against Acquisition, as opposed to FDIC. This decision is contrary to any lien law. Should a lien not follow the property, rather than the fee holder, mortgage liens as well as mechanic liens would be lost by this reasoning. It is clear that the Court overlooked and misapplied Chapter 713 of the Florida Statutes. A lienor or assigns under contract is entitled to maintain an action at law for the foreclosure of its lien on the real property regardless of the

fee title holder.

This Court's ruling that Mr. Hemmerle controlled Acquisition Corp. of America (ACA) and Sun-Island Realty at all times material to the aforementioned action, is unfounded, and denied by Mr. Hemmerle. Further, it has never been mentioned or challenged in the trial court that Hemmerle was ever a controlling party of either ACA or Sun-Island Realty, as such it appears that this defense was never made and should not be considered for the first time on appeat. The Race Inv. v. Lake Y River Recreational Properties, Inc., 573 So. 2d 409 (Fla. 1st DCA 1991); Pandol Brothers Inc. v. NCNB National Band of Florida, 450 So. 2d 592 (Fla. 4th DCA 1984).

The Court has overlooked and failed to apply it own decision in the case of Sunshine Utilities Equipment, Inv. v. treasure Coast Utilities, Inc. 421 So. 2d 1096 (Fla. 4th DCA 1982). In reversing, this court held that: (1) in identifying the issues previously adjudicated, in order to apply the doctrines of res judicata or estoppel by judgment the Court may consider only the record of the prior action and that the same

principle applies to the doctrine of merger, and (2) the trial court erred by considering extrinsic evidence concerning the prior judgment. Indeed if the Court now follows its ruling in Sunshine, supra is clear that the record of the prior action was not part of the case sub judice, nor were any of the prior issues make by the pleading in the Court below. It appears that the Court has made conclusions on matters not a part of this appeal in which to support it opinion.

Had the Court followed the findings of the Supreme Court in Mobile Oil Corp. v. Shevin, 354 So. 2d 372 (Fla. 1977) it would have reversed the Summary Judgment in that the essential elements of the doctrine that the parties and issues be identical was not present, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction was also not apparent.

This issue of lien foreclosure was never litigated or determined in a prior action, and as such, it appears that the court overlooked controlling case in Nationwide Mutual Fire

Insurance Co. v. Race, 508 So. 2d 1276, 1280 (Fla. 3d DCA 1987).

WHEREFORE, it is respectfully requested that a Regearing be had and the opinion revised as to both law and fact, in compliance with controlling case and statutory provisions regarding the Mechanic Lien Law, believing that a re-examination of such controlling case law and the record made by the trial court, and the arguments advanced herein, will result in a revision and reversal of the Summary Judgment permitting a trial on its merits before a trier of fact, or that a miscarriage of justice will occur if the Summary Judgment is not reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true correct copy of the foregoing has been furnished by U.S. Mail to SUZANNE H. YOUMANS, ESQ., 320 Royal Poinciano Plaza, Palm Beach, Florida 33480, this 5th day of October, 1992.

RICHARD G. DOGGETT, P.A.
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 767-9055

By _____
Richard G. Doggett, Esq.
Florida Bar No. 301426

APPENDIX M

IN THE DISTRICT COURT OF APEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

SUN-ISLAND REALTY, INC., & KENNETH HEMMERLE — CASE NO. 92-00063

Appellant(s),

vs. L.T. CASE NO. CL 88-10252 AN

FEDERAL DEPOSIT INSURANCE CORPORATION, etc.,

Appellee(s).

November 18, 1992

BY ORDER OF THE COURT:

ORDERED that appellants" motions filed October 8, 1992, for rehearing are hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

MARYLIN BEUTTENMULLER
CLERK.
cc: Richard G. Doggett
Kenneth V. Hemmerle
Suzanne H. Youmans

/CH

APPENDIX N

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

SUN-ISLAND REALTY, INC.
and **KENNETH HEMMERLE**

Appellants,

-VS- **CASE NO. 92-0063**

FEDERAL DEPOSIT INSURANCE CORPORATION, etc., **L.T. CASE NO. CL -10252 (AN)**

_____/

NOTICE OF APPEAL AND NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Defendants, Appellants appeal to the **FLORIDA SUPREME COURT** pursuant to Rule 9.030 (a) (ii) of the Florida Rules of Appellate Procedure, the Order of the **FOURTH DISTRICT COURT OF APPEAL,** rendered November 18, 1992, denying Appellants' Motion for Rehearing. The nature of the Order is a Final Order declaring invalid and disregarding the statutory authority in Chapter 713 of the Florida Statutes, as well as Article I, Section 9 and Article I, Section 21 of the Constitution of the State of Florida.

NOTICE IS FURTHER GIVEN that Defendants, Appellants, invokes the discretionary jurisdiction of the **SUPREME COURT** to review the decision of this Court rendered November 18, 1992. The decisio expressly and directly conflicts with a decision of another District Court of Appeal and the Supreme Court on the same question of law.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing **Notice of Appeal** has been furnished by U.S. Mai to **SUZANNE H. YOUMANS, ESQ.,** 320 Royal Poinciana Plaza, Palm Beach, Florida 33480 this 7th day of December, 1992.

KENNETH HEMMERLE
808 Northeast Third Avenue
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Telephone: (305) 467-6801

Jan Michael Morris, Esq.
2540 N.E. Miami Gardens Drive
North Miami Beach, FL 33180
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Attorney for **SUN-ISLAND**

APPENDIX O

IN THE SUPREME COURT OF FLORIDA

SUN-ISLAND REALTY, INC.,
and **KENNETH HEMMERLE**

Appellates-Petitioners

-VS-

FEDERAL DEPOSIT INSURANCE CORPORATION, etc.,

Appellee-Respondant,
_____/

AMENDED PETITION FOR REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

JURISDICTIONAL STATEMENT

KENNETH HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

JAN MICHAEL MORRIS
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North Miami Beach, FL 33180
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A. WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA HAS THE INHERENT AUTHORITY TO DECLARE INVALID CHAPTER 713 OF THE FLORIDA STATUTES.

B. WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA HAS THE INHERENT AUTHORITY TO DECLARE INVALID CHAPTER 85 OF THE FLORIDA STATUTES.

C. WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA HAS THE INHERENT AUTHORITY TO DENY A PARTY HIS OR ITS DECLARATION OF RIGHTS AS TO THE ENUNCIATION OF SECTIONS 2, 9, 10 OR 21 OF THE CONSTITUTIONS OF THE STATE OF FLORIDA.

D. WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL, EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL, AND THIS COURT ON THE SAME QUESTIONS OF LAW.

E. WHETHER THE APPELLANTS WERE DENIED DUE PROCESS AND EQUAL PROTECTION WHEN DENIED THE RIGHT OF FORECLOSURE ON THE BASIS OF RES JUDICATA OR ESTOPPEL BY JUDGMENT WHEN NEIGHER APPELLANT EVER HAD A DAY IN COURT REGARDING THE LIEN FORECLOSURE WHICH IS CONTRARY TO THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL WHICH ALLUDED TO THE APPELLANTS HAVING A FOURTH BITE OF THE APPLE.

F. WHETHER IT IS NECESSARY TO HAVE THE RECORD OF THE PRIOR ACTION TO IDENTIFY THE ISSUES PREVIOUSLY ADJUDICATED IN WHICH TO APPLY RES JUDICATA OR ESTOPPEL BY JUDGMENT.

G. WHETHER RES JUDICATA OR ESTOPPEL BY JUDGMENT CAN APPLY WHEN NO JUDGMENT EXISTS AS TO ANY PRIOR LITIGATION.

PREFACE

Appellants-Petitioners are designated as "SIR" and "HEMMERLE", and collectively referred to as Appellants or Petitioners.

Appellee-Respondant will be refieerd to as the FSLIC, FDIC or Appellee or Respondant.

Citations to the Appendix appear as (A_)

TABLE OF AUTHORITIES

CASES PAGE

Allbright v. Hanft
333 So. 2d 112, (Fla. 2d DCA 1976)

Allstate Insurance Co. v. A.D.H., Inc.
397 So. 2d 928 (Fla. 3d DCA 1981)

Culloden v. Music
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Diagneau v. National Cash Register Co.
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First National Bank v. Burnup & Sims of Melbourne, Inc.
137 So. 2d 13 (Fla. 2d DCA 1962)

Hethcoat v. Chevron Oil Co.
380 So. 2d 1035 (Fla. 1980)

Hittel v. Rosenhagen
492 So. 2d 1086 (Fla. 4th DCA 1986)

Pipkin v. Wiggins
526 So. 2d 1002 (Fla. 3d DCA 1988)

Krug v. Meros

468 So. 2d 299 (Fla. 2d DCA 1985)

Matthews v. Matthews
133 So. 2d 91 (Fla. 2d DCA 1962)

Mobile Oil Corp. v. Shevin
354 So. 2d 372 (Fla. 1977)

Nail v. Rinker Materials Corp.
528 So. 2d 450, rev den 537 So. 2d 569 (Fla. 4th DCA 1981)

Nationwide Mutual Fire Insurance Co. v. Race
508 So. 2d 1276 (Fla. 3d DCA 1987)

Newport Division Tenneco Chem., v. Thompson
330 So. 2d 826 (Fla 1st DCA 1976)

Quality Industries v. Keyes
509 So. 2d 1248 (Fla. 2d DCA 1987)

Seaboard Coast Line R. Co. v. Cox
338 So. 2d 190 (Fla. 1976)

Seaboard Coast Like R. Co. v. Industrial Contr. Co.
260 So. 2d 860 (Fla. 4th DCA 1972)

Sunshine Utilities Equipment, Inc. v. Treas. Coast Util.
421 So. 2d 1096 (Fla. 4th DCA 1982)

Universal A.D.H., Inc. v. Fort Lauderdale
68 So. 2d 366 (Fla. 1953)

Ward v. Zeidwig
521 So. 2d 215 (Fla. 4th DCA 1988)

Youngbloud v. Taylor
89 So. 2d 503 (Fla. 1956)

STATEMENT OF THE CASE AND THE FACTS

Following the takeover of **SUNRISE SAVINGS & LOAN ASSOCIATION** (SUNRISE) by the Federal Savings and Loan Insurance Corporation (FSLIC). On September 1, 1987, the FSLIC enterred into an agreement with Acquisition Corp. of Americn (ACA) where it was agreed between the parties that ACA would improve the real estate during a 120 day period, and that said improvements would total $2,000,000.00 **ACA** contracted with HEMMERLE d/b/a HEMMERLE CONSTRUCTION COMPANY (**"HCC"**) for such improvements. **HCC** made the improvements on the real property in amount exceeding $1,886,560,000.00 which the FSLIC refused or was unable to fund. The FSLIC refused to honor the draw request notwithstanding that it was included in the first modification of the construction loan which was authored by the FSLIC. Following the refusal to honor pr pay the draw request made by **HCC**, on December 30, 1987 **HCC** filed a Mechanic's Lien on the subject property. (Appendix "A"). And on Nobember 2, 1987, **HCC** filed a Lis Pendens

on the subject property, and assigned certain rights of this lien and a part of the proceeds to SIR in which to make SIR whole for its construction advaicements. (Appendix "B", Complaint). On December 19, 1988, the FSLIC filed a Motion to Dismiss the Complaint and discharge the Mechanic Lien. On January 13, 1989, the trial court denied the FSLIC'S motion to dismiss and discharge lien. Following the Court's order denying the motions, the FSLIC filed its Answer and Affirmative Defenses. On February 23, 1989, the FSLIC filed a Motion for Summary Judgment, and on April 4, 1989, Plaintiff, HEMMERLE and SIR filed a verified Motion to Strike the FSLIC'S Motion for Summary Judgment as being wholly sham. On June 30, 1989, the FSLIC filed an Amended Motion for Summary Judgment. (Appendix "C"). This amended motion was heard on November 17, 1989, wherein the trial court ordered Memorandums of law as to Count I of the Complaint. On November 17, 1989, the Court denied the FSLIC'S amended Motion for Summary Judgment. Following the appointment of the third judge in this case, on February

5, 1991, and after the case was set for jury trial, the FSLIC filed a renewed Motion for Summary Judgment, together with a memorandum, and on February 7, 1991, the FSLIC filed a Motion to Strike the case from jury docket. On February 19, 1991, the Plaintiffs filed their response to the FSLIC'S renewed Motion for Summary Judgment showing no new proofs. (Appendix "D"). After the filing of affidavits and memorandums of law in opposition, on November 14, 1991, the Trial court granted the FSLIC'S Renewed Motion for Summary Judgment. (Appendix "E"). On November 21, 1991, the Plaintiffs filed a Motion for Rehearing and/or Reconsideration, (Appendix "F"). On December 17, 1991, the trial court denied Plaintiffs' Motion for Rehearing and/or Reconsideration, upon which the Plaintiffs appealed to the District Court of Appeal, Fourth District of Florida. Appellants argued that there has never been a dispute as to whether or not the work was performed which gave rise to the Mechanic Lien. It was only that the FSLIC claimed they were not responsible for the indebtedness created by ACE,

notwithstanding that it was teh FSLIC that made it mandatory that the imrpovements be made as part of the settlement agreement, and further itwas the new owner of the subject property. (Appendix "G", Initial Brief). The FSLIC in claimed that the new proofs was a judgment entered in favor of HEMMERLE and SIR on September 19, 1989, in Case No. 88-818, which was the basis of res judicata and/or estoppel by judgment, in that the judgment entered against the FSLIC, was for the same improvements that gave rise to the Claim of Lien. Petitioners' claimed that although this allegation was without merit, and untrue, even if theargement of res judicata and/or estoppel by judgment stemming from Case No. 88-818, were for the same improvements, the first amended motion for summary judgment that was heard and denied on November 9, 1989, was denied on the same grounds, and further, was some 55 days after the jury entered its verdict in Case No. 88-818. In addition to the argument made by the FSLIC in support of its motion for summary judgment that the claim of lien had been satisfied by the prior judgment, the

prior judgment had been reversed, and as such, nothing was forthcoming in which to satisfy the claim of lien. (Appendix "H", Reply Brief). After full briefing, on September 30, 1992, the District Court of Appeal, Fourth District of Florida, entered its opinion of affirmance of judgment entered by the trial court. (Appendix "I", Opinion). On October 8, 1992, Appellants each filed their own version of a Motion for Rehearing. (Appendix "J" and "K"). On October 8, 1992, the District Court of Appeal denied Appellants' Motions for Rehearing. (Appendix ""). On December 9, 1992, Appellants filed a Notice of Appeal and a Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

The District Court of Appeal, Fourth District of Florida by its opinion, declared invalid Chapter 713 of the Florida Statutes in affirming the trial court's summary judgment based on the doctrine of res judicata and estoppel by judgment. The record revealed that neither plaintiff ever had the mechanic lien adjudicated which would support such

doctrines. By the Appellate Court's refusal to reverse, denied the appellants their right to trail on the merits, and prevented the appellants from maintaining action for the security of the debt, as such, prejudiced the rights of the lienors and departed from the essential equirements of law and Chapter 713 and Chapter 85 of the Florida Statutes.

The Appellate court exceeded its inherent authority when it denied Appellants the Declaration of Rights as to the enunciation of Sections 2, 9, 10 and 21 of the Constutition of the State of Florida, as such, denied equal protection of the laws, right and privilege in violation of equality clause in the Fourteenth Amendement of the United States Constitution. Further, by affirming the summary judgment where genuine issues of material fact existed, violated the due process clause in its substantive aspect by failing to apply equal operation of the laws of the State of Florida, and this, prevented freedon from arbitrary action.

The Appellate Court expressly and directly conflicted with decisions of other District Courts of Appeal, and the

Florida Supreme Court on the same question of law.

The Appellate Court denied due process and equal protection of the law when it denied the right of foreclosure on the basis of res judicata and/or estoppel by judgment. It was necessary to have the record of any prior action to identify the issues previously adjudicated in which to support the doctrine of res judicata and/or estoppel by judgment. No judgment was presented to the trial court to support such doctrines since no record existed.

ARGUMENT

ISSUES ON APPEAL AND DISCRETIONARY REVIEW:

A & B. Does the District Court of Appeal, Fourth District of Florida have the inherene authority to declare invalid Chapters 713 and 85 of the Florida Statutes?

ANSWER: No, if an act is one which a court does not have inherent power to exercise, the court must look to the statutory authorization, and must substantially follow its statutory authorization in all material proceedings. The Legislative recognition of a judicial practice does not serve to

establish such parctice as being within the court's inherent powers.

C. Does the Appellate court have authority to deny a party his or its declaration of rights as to the enunciation of Sections 2, 9, 10 and 21 of the Constitution of the State of Florida?

ANSWER: No, in this case, it is clear that Section 2, ***Basic right;*** Section 9,***Due process;*** Section 10, ***Prohibited laws;*** and Section 21, ***Access to Court*** have been totally disregarded by the trial court as well as the Appellate Court.

D. Does the opinion of the Appellate Court expressly and directly conflict with decisions of other District Courts of Appeal, and the Supreme Court on the same questions of law?

ANSWER: Yes, by the total disregard of the express terms and authorities necessary to support the doctrines of res judicata and estoppel by judgment has in fact been shown to be absense of all necessary elements required to support such doctrines.

E. Was the Petitioners denied due process and equal protection when denied the right fo foreclosure on the basis of res judicata or estoppel by judgment when they never had a day in court regarding such lien foreclosure?

ANSWER: Yes, a review of teh record will reveal that SIR and HEMMERLE had but one day in court, and prevailed on the trial leve, which was later overturne dby the same Appellate Court with directions for the trial court to enter directed verdicts, notwithstanding that the verdict in regard to **SIR** was never challenged by the adversary in that appeal.

F. Is it necessary to have the record of a prior action of judgment to identify the issues previously adjudicated in which to apply res judicata or estoppel by judgment?

ANSWER: Yes, the record before the trial court and the appellate court did not show any prior judgments, prior litigations or the identity of any issue previously adjudicated to support the doctrines of res judicata or estoppel by judgment.

G. Can res judicata or estoppel by judgment apply

when no judgment exists as to any prior litigation?

ANSWER: No. The Appellate Court was without authority to deny a party the Declaration of Rights as to the enunciation of Section 2, 9, 10 and 21 of the Constitution of the State of Florida, such, is a denial of due process and equal right afforded to all.

Each of the cases cited by the Appellate Court, draws a different inference than that required to support a summary judgment. It is an absolute rule that a judgment or decree rendered on any grounds which do not involve the merits of the action may not be used as the basis for the operation of the doctrine of res judicata. The Appellate Court's opinion in this regard is in direct conflict with ***Allbright v. Hanft,*** 333 So. 2d 112, (Fla. 2d DCA 1976). In ***Sunshine Utlities Equipment, Inc. v. Treasure Coast Utilities, Inc.,***

421 So. 2d 1096 (Fla. 4th DCA 1982) the Fourth District Court of Appeal reversed holding that: (1) In identifying the issues previously adjudicated, in order to apply the doctrine of res judicate or estoppel by judgment, the Court may

consider only the record of the prior action and that the same principle applies to the doctrine of merger, and (2) the trial court erred by consicering extrinsic evidence concerning the prior judgment. The opinion is in direct donflict with the Appellate Court's own opinion in ***Sunshine.*** The Appellate Court opinion is in direct conflict with; ***Culloden v. Music,*** 226 So. 2d 240 (Fla. 2d DCA 1969); ***Seaboard Coast Line Railroad Co. v. Industrial Contracting Co.,*** 260 So. 2d 860 (Fla. 4th DCA 1972); ***Matthews v. Matthews,*** 133 So. 2d 91 (Fla. 2d DCA 1961); ***Youngblood v. Taylor,*** 89 So. 2d 503 (Fla. 1956); ***Seaboard Coast Line R. Co. v. Cox,*** 338 So. 2d 190 (Fla. 1976); ***Newport Division Tenneco Chem., v. Thompson*** 330 So. 2d 826 (Fla. 1st DCA 1976); ***Diagneau v. National Cash Register Co.,*** 247 So. 2d 465 (Fla. 4th DCA 1971). The Appellate Court cited ***Krug v. Meros,*** 468 So. 2d 299 (Fla. So. 2d 1985) to support its opinion. In ***Krug*** the court held that wer issue is not litigated in prior suit, estoppel by judgment does not arise. This holding should have in itself been found sufficient to reverse the summary judgment in

that the issues raised by the lien foreclosure action was never litigated in any action, and the parties were different. The Appellate Court's opinion is in conflict with ***Allstate Insuramce Co. v. A.D.H., Inc.,*** 397 So. 2d 928 (Fla 3d DCA 1981); ***Universal Constr. Co. v. Fort Lauderdale,*** 68 So. 2d 366 (Fla. 1953); ***Nationwide Mutual fire Insuramce Co. v. Race,*** 508 So. 2d 1276 (Fla. 3d DCA 1987); ***Mobile Oil Corp. v. Shevin,*** 354 So. 2d 372 (Fla. 1977). In ***First National Bank v. Burnup & Sims of Melbourne, Inc.,*** 137 So. 2d 13 (Fla. 2d DCA 1962) it was held that the clear existence of an issue on a material fact repsecting the right to a lien precluded entry of a summary decree in a suit ot foreclose the lien. By this holding, the Appellate Court made clear that the issues in a lien foreclosure action were not the same as the guaranty or breach of contract action. The Appellate Court's opinion also conflicted with ***Hittel v. Rosenhagen,*** 492 So. 2d 1986 (Fla. 4th DCA 1986); ***Pipkin v. Wiggins,*** 526 So. 2d 1002 (Fla. 3d DCA 1988). Florida Statutes, Section 713.30 provides that the Mechanics' Lien Law is cumulative to other existing remedies.

In ***Quality Industries v. Keyes,*** 509 So. 2d 1248 (Fla. 2d DCA 1987) it was held that tendency of an action t enforce a contractor's lien against property did not preclude the contractors independent contract action against the property owners to recover the outstanding balance on the contract to improve the property. In the case *sub justice,* the contract between **ACA** and **HCC** was not a part, obligates the owner of the property for such improvements. To affirm the Appellate Court was in direct conflict with ***Rutenberg-Sarasota, Ltd. v. Kisner,*** 509 So. 2d 398 (Fla. 2d DCA 1987) which held that "those agreement was based upon subcontractor's direct contract with owner and developer for improvement of real property, had standing to utilize mechanics' lien law. In ***Ward v. Zeidwig,*** 521 So. 2d 215 (Fla. 4th DCA 1988) holding that the Supreme Court's statement that mutuality of parties remains a prerequisite to the application of the doctrine of collateral estoppel. Again, the Appellate court conflicted and failed to apply its own decision regarding the application of the doctrine of collateral

estoppel.

In ***Hethcoat v. Chevron Oil Co.,*** 380 So. 2d 1035 (Fla. 1980), on remand (Fla. 1st DCA) 383 So. 2d 931, holding that a District Court decision on review by certiorari would be quashed and remanded with regard to that part of the decision which conflicted with a subsequent Supreme Court decision in another case. It is clear that the opinion of the appellate Court expressly and directly conflicted with decisions of other district courts of appeal, and the Supreme Court on the same questions of law.

CONCLUSION

Appellants-Petitioners submit that this Jurisdictional Statement brings before the Court substantial misapplications of the law; is a departure of the essential requirement of the law; has violated the Florida Cosntitution and the Fourteenth Amendment of the Untied States Constitution; had declared invalid Chapter 85 and 713 of the Florida Statutes, and is expressly and directly in conflict with decisions of its own decision; decisions of other District Courts of Appeal, and

decisions of the Supreme Court of the State of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been fornished by U.S. Mail to **SUZANNE H. YOUNAMS, ESQ.,** 320 Royal Poinciana Plaza, Palm Beach, Florida 33480, this 16th day of January, 1993.

KENNETH HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

APPENDIX P

SUPREME COURT OF FLORIDA

Thursday, May 6, 1993

SUN-ISLAND REALTY, INC>
ET AL.,

CASE NO. 80,913

Petitioners/Appellants,

District Court of Appeal,
4th District - No. 92-0063

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, ETC.,

Respondent/Appellee.

This case having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the appeal is dismissed and the petition for review is denied.

OVERTON, MCDONALD, SHAW, GRIMES and KOGAN, JJ., concur

BH

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Dorothy Wilken, Clerk
Hon. Edward H. Fine, Judge
Mr. Jan Michael Morris
Mr. Kenneth Hemmerle
Ms. Suzanne H. Youmans

Sid J. White
Clerk, Supreme Court

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

KENNETH HEMMERLE and SUN-ISLAND REALTY, INC.,

Petitioners,

-VS-

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for SUNRISE SAVINGS AND LOAN ASSOCIATION,

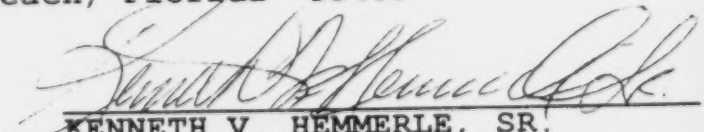
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of Petitioners' Petition for Writ of Certiorari has been furnished by U. S. Mail, this 18th day of September, 1993, to the following:

THE SUPREME COURT OF FLORIDA
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925

SUZANNE H. YOUMANS, ESQUIRE
320 Royal Poinciano Plaza
Palm Beach, Florida 33480



KENNETH V. HEMMERLE, SR.
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

93-579

Supreme Court, U.S.
FILED
SEP 20 1993
OFFICE OF THE CLERK

Case No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

KENNETH HEMMERLE AND
SUN-ISLAND REALTY, INC.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE
INSURANCE CORPORATION, as
Receiver for SUNRISE SAVINGS AND LOAN ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Supplement to

PETITION FOR WRIT OF CERTIORARI

KENNETH V. HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, FL 33304
(305) 467-6801

Petitioner hereby submits this supplement to

Case No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

KENNETH HEMMERLE AND
SUN-ISLAND REALTY, INC.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE
INSURANCE CORPORATION, as
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

KENNETH V. HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, FL 33304
(305) 467-6801

The opinion was erroneously omitted from the original

PETITION FOR WRIT OF CERTIORARI.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

SUN ISLAND REALTY, INC.,
and KENNETH HEMMERLE,
Appellants,

v. CASE NO. 92-0063
L.T. Case No. 88-10252 AN.

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver
for SUNRISE SAVINGS AND
LOAN ASSOCIATION,
Appellee.

Opinion filed September 30, 1992

Appeal from the Circuit Court
for Palm Beach County;
Edward H. Fine, Judge.

Richard G. Doggett of
Richard G. Doggett, P.A.,
Fort Lauderdale, for appellant
Sun-Island Realty, Inc.

Kenneth Hemmerle, Fort Lauderdale,
pro se appellant.

Suzanne H. Youmans, Palm Beach,
for appellee.

PER CURIAM.

Sun-Island Realty, Inc, and Kenneth Hemmerle appeal

---

from a summary judgment entered in favor of appellees, FDIC

(as receiver for Sunrise Savings and Loan Association) and an order denying their motion for rehearing. We affirm.

This is Mr. Hemmerle's fourth attempt to prevail on issues litigated and decided in FDIC's favor. See Federal Deposit Ins. Corp. v. Hemmerle and Sun-Island Realty, Inc., 592 So. 2d 1110 (Fla. 4th DCA 1991); Hemmerle v. Federal Deposit Ins. Corp., 556 So. 2d 457 (Fla. DCA 1990); Acquisition Corp. of America, Sun-Island Realty, Inc., and Kenneth Hemmerle v. Federal Deposit Ins. Corp., 760 F.Supp 1558 (S.D. Fla. 1991). We decline to give Mr. Hemmerle yet a fourth bite of the apple. "Once a party has had an opportunity to litigate a matter in an action in a court of competent jurisdiction, he should not be permitted to litigate it again to the harassment and vexation of his opponent." New River Yachting Center, Inc. v. Bacchiocchi, 407 So. 2d 607, 609 (Fla. 4th DCA 1981), rev. denied, 415 So. 2d 1360 (Fla. 1982).

Given our opinion in appellants' previous appeal, see 592 So. 2d 1110, appellants' claim that Hemmerle, d/b/a

Hemmerle Construction, has never been a party to any litigation with FDIC or its predecessors and is thus not bound by earlier judgments, is repetitive and specious. We specifically held in that case that "[a] ruling adverse to a controlling person of a corporation precludes the corporation from litigating that claim in a subsequent action." 592 So. 2d at 1117. Mr. Hemmerle controlled Acquisition Corp. of America (ACA) and Sun-Island Realty at all times material to the aforementioned actions.

The fact that the instant proceedings involve a mechanic's lien claim, as opposed to breach of contract claim (in Mr. Hemmerle's previous guaranty action,), is irrelevant. Estoppel by judgment applies "whether the causes of action in the two suits be identical or different." McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 2d 323, 327 (Fla. 1935). In order to apply the doctrine of estoppel by judgment, the causes of action in the two suits must be different and the real parties in interest must be identical to both suits. Krug v. Meros, 468 So. 2d 299 (Fla. 2d DCA), rev. denied, 480 So. 2d

1295 (Fla. 1985); Seaboard Coast Line R.R. v. Cox, 338 So. 2d 190 (Fla. 1976). The claims at bar have in common with the guaranty litigation the issues of execution and performance of the settlement agreement; the mechanic's lien claim is based on the settlement agreement which was the subject of the guaranty action.[1] Thus, the guaranty action

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[1] The subject settlement agreement in the previous case provided for entry of judgment of foreclosure on certain real property in Palm Beach County against Acquisition Corp. if FSLIC (DFDIC's predecessor) did not receive payment of $8.2 million from ACA on or before December 31, 1987. As a part of the settlement agreement, Hemmerle and Sun-Island executed and delivered to FSLIC a conditional guaranty of payment; they guaranteed payment of the debt owed FSLIC in the event, inter alia, that ACA should seek bankruptcy relief. FSLIC did not receive the $8.2 million by December 31, 1987.

Appellants' other points lack merit as well. the settlement agreement obligated ACA to compete approximately $2 million of improvements to the subject property at ACA's sole cost and expense. Any claim arising from such improvements lies against Acquisition, as opposed to FDIC. Although the trial court did not specifically address this argument, we affirm. See Parker v. Gordon, 442 So. 2d 273, 275 (Fla. 4th DCA 1983); Applegate v. Barnett Bank, 377 So. 2d 1150, 1152 (Fla. 1980).

Accordingly, we affirm the summary judgment entered in FDLC's favor in all respects.

DOWNEY, GUNTHER and POLEN, JJ., concur.

disposed of the issues underlying the instant claim. See Wise v. Tucker, 399 So. 2d 500, 502 (Fla. 4th DCA 1981). Moreover, appellant could have raised the mechanic's lien claim in the guaranty action and did not.

> Under the doctrine of res judicata, a final judgment or decree on the merits, by a court of competent jurisdiction, constitutes an absolute bar to a subsequent suit on the same cause of action, and concludes all issues which were raised in the action.

Id. [Citations omitted.]

Hemmerle, who controlled Acquisition, caused it file a Chapter 11 bankruptcy petition on December 30, 1987. On December 31, 1987, Hemmerle, d/b/a Hemmerle construction Co., recorded a claim of lien in the amount of $1,886,560, against the subject property. On the same day, Hemmerle assigned the claim of lien to Sun-Island. This is the lien which is the subject of this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that three copies of the foregoing Petition has been furnished by U.S. Mail, this ___ _ September, 1993, to:

SUZANNE H. YOUMANS, ESQUIRE
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